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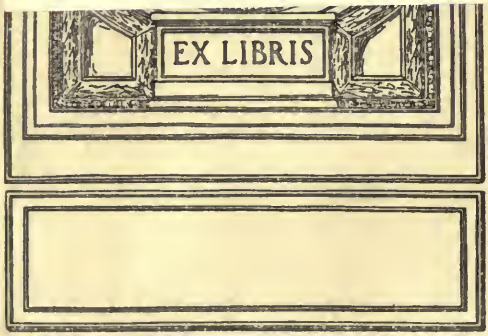

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Business Law—Case Method

SEVEN VOLUMES

Prepared under the Editorial Supervision of

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and

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A Systematic Non-Technical Treatment of

Business Law in Story and Case Form

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PERSONS

I. INFANTS

1. Period of Infancy

STORY CASE

John Jones was born on September 28, 1880. On September 27, 1901, he agreed to buy a city lot from Fred Smith, a real estate agent. By this agreement which was made in writing, Jones was to pay $750 for the lot. The deed was to be made and delivered and the money paid thirty days later. Ten days later John Jones decided that he did not wish to buy the lot. He called on Smith and told him he had come to the conclusion that he did not want to buy the lot. He claimed that he was an infant and therefore the contract was not binding on him. Fred Smith then sued him. The right of Smith to recover depended upon whether John Jones was of age when the contract was entered into.

Under the foregoing circumstances, what would be the decision of the Court?

RULING COURT CASE

Hamlin vs. Stevenson, Volume 4 *Dana* (*Kentucky Reports*) *Page* 597.

Stevenson owed Hamlin a sum of money which he refused to pay. Hamlin who was still an infant started this action against Stevenson to recover the debt. Stevenson had no real defense on the suit and so filed a dilatory defense to the effect that Hamlin was an infant and therefore ought to bring suit by a "next friend" according to the requirements of the court. It happened that Stevenson made this plea on the day preceding Hamlin's twenty-first birthday and this was

also the day of the trial. The question at issue was whether Hamlin had reached his majority on that day.

Chief Justice Robertson gave the opinion of the Court: "It is the common law that a person is twenty-one years old on the day preceding the twenty-first anniversary of his birth. Therefore, Hamlin was of age on the day when the plea was filed, and when the issue upon it was tried. Consequently he had the right to prosecute the suit in his own name without the intervention of a friend.

RULING LAW

Story Case Answer

It is the general rule that a person is an infant or minor until such person reach twenty-one years of age. The period of infancy terminates on the day before his twenty-first birthday. In the Story Case, John Jones was of age when the contract was entered into, and therefore the contract was binding upon him, and judgment should be given for the plaintiff.

By statute, in many states, the common law rule regarding the period of infancy has been changed, especially with reference to females. In most states it is provided by statutory enactments that females become of age upon attaining their eighteenth birthday. In the Story Case, John Jones was twenty-one years old on the day he made the contract, and therefore his plea of infancy is not valid.

---

2. Contracts Which Can Be Avoided

A. Voidability

STORY CASE

Clyde Mason, a young man of nineteen years, had a considerable amount of money which he wished to in-

vest in real estate. He went to Charley Tatum, who owned a very fine farm, and offered him $10,000 for his estate. Tatum was willing to sell his farm, and they immediately entered into a written contract by which Clyde Mason purchased the farm for the sum of $10,000. By their agreement the deed was to be delivered and the purchase money paid thirty days later. About fifteen days later, the Illinois Railroad Company decided to build a railroad through that section of the country: This decision on the part of the company almost doubled the value of the farm in question. When the time came for delivery of the deed, Tatum refused to carry out his part of the contract. Clyde Mason brought a bill for specific performance of his contract; that is, he asked the Court to compel Tatum to convey to him the title to the farm. Tatum contended that a contract with an infant is absolutely void and that no rights at all were created by the contract.

Should the infant be entitled to have a conveyance of the land under the facts above stated?

RULING COURT CASE

Person vs. Chase, Volume 37, *Vermont Reports, Page* 647; *Volume* 88, *American Decisions, Page* 630.

The minor son of the plaintiff, Person, was engaged to be married to the minor daughter of the defendant, Chase. During their engagement the plaintiff's son had been very generous, and had given the defendant's daughter many valuable gifts. A short time prior to the date set for the marriage, the plaintiff's son died. This action was brought by the plaintiff, as administrator of his son, to recover these articles so given.

Decision: An absolute gift of personal property made by an infant can be revoked by himself, or by his personal representative after his death. Such a gift, however, is not void; it is only voidable; that is, the gift remains binding unless the infant, or his personal representative, decides to revoke it.

Mr. Kellogg, J. said in part: "There is a recognized distinction between those acts of an infant which are voidable, and those which are void. In *William vs. Moore,* 11 M & W 256, Baron Parke recognizes the indefinite use of the term 'void' and clearly defines its application to the acts and contracts of infants, saying that an infant's contracts are void, if by void is meant incapable of being enforced against him; but that if by void is meant incapable of being ratified, then they are not void. The tendency of modern decisions is to hold the acts and contracts of infants merely voidable." The infant can avoid the contract if he chooses, but the other party is bound absolutely unless he also is an infant. The infant can avoid his gifts and demand their return—His administrator can do the same—Person can recover in this case.

RULING LAW

Story Case Answer

Because of the immaturity and inexperience of most infants, and the consequent likelihood that unfair advantage will be taken of them by their more experienced and unscrupulous elders, the policy of the law is to protect them during their minority by refusing to enforce contracts against them. If contracts of infants were absolutely void, great injustice would be worked upon infants because they would not be able

to make any contracts. Therefore such contracts are binding upon infants unless they choose at the proper time to repudiate them. Such a contract is said to be a voidable contract.

In the Story Case, Tatum was claiming that the contract of the infant was absolutely void; he hoped by that contention, if sustained, to gain profit from the incapacity of the infant. But in such a case the court would hold that the contract was only voidable. The value of the land having increased, the infant would have the right to ratify the contract and take advantage of the increase. If the value had decreased in the meantime, the infant, had he wished, could have elected to repudiate the contract, and it could not have been enforced against him.

A *void contract* of an infant is one which has no legal force or effect whatsoever. No act, affirmation, or ratification of the infant can give it any legal force or effect. But a *voidable contract* is one which is binding upon the infant, leaving to him, however, the right to ratify or disaffirm as he chooses. The courts hold that an infant's contract is voidable, i. e., can be avoided by him, but that he can hold the other party unless the latter is also an infant.

B. Disaffirmance During Minority

STORY CASE

Clifford Malone, a boy of the age of fifteen years, wished to buy a bicycle. His father refused to buy it for him. He worked for several months, saved his money, and without consulting his father, purchased a wheel from Dave White, a bicycle dealer. When his

father, the following day, discovered what his son had done, he persuaded him to return the wheel and demand his money. Clifford proceeded to do this but White refused to return the money. It was contended by White that Clifford Malone could not disaffirm his contract until he reached full age. What should the Court decide?

RULING COURT CASE

Rice vs. Boyer, Volume 108 *Indiana, Page* 472; *Volume* 58 *American Reports, Page* 53.

The defendant, who was under age, falsely and fraudulently represented to the plaintiff that he was twenty-one years of age. Relying upon these representations of the defendant, the plaintiff was induced to sell to the defendant a buggy and a set of harness. In part payment the plaintiff received from the defendant a promissory note. Sometime thereafter the defendant sold the property and repudiated his obligation on the note. The plaintiff then brought this action to recover damages which he sustained by virtue of the defendant's fraud. It was contended by the defendant that the action was prematurely begun because he was an infant and was unable to disaffirm a contract until he reached his majority.

Decision: An infant, during the period of his nonage, may repudiate his contracts respecting personal property. From the facts of the case, it clearly appeared that the defendant had repudiated the contract of sale here involved. Such being the case, the contract was gone, and the plaintiff was without remedy, unless he could recover damages caused by the fraudulent conduct of the defendant.

RULING LAW

Story Case Answer

The right of the infant to avoid a contract made during nonage is for his protection. The law regards him as unable to exercise sufficient discretion in business matters during this time, but it does not compel him to wait until he reaches twenty-one years of age before he is permitted to exercise his right to withdraw from contracts made by him. At any time during his nonage he may repudiate his contracts. He may make a contract one hour and withdraw from it the next. It must be remembered that this applies only to contracts regarding personal property. He must wait until he reaches twenty-one years before he can repudiate the sale of real property. In the Story Case, Clifford Malone can disaffirm the contract and recover the purchase money from White.

C. Disaffirmance After Majority

STORY CASE

Howard Taylor, a young man of eighteen years of age, ran a little grocery store in Peoria. As his business was increasing very rapidly he decided to get a horse and delivery wagon. He bought the horse from Richard Lacey, who knew he was a minor but made no objection on that account. He continued in business for about five years after he came of age, using the horse in the business all this time. Eventually he decided that he would go out of business. He returned the horse to Lacey, and demanded the return of the purchase money, saying that he had elected to disaffirm the contract which had been made while he was an infant. Lacey refused to accept the horse, or

to refund the money and Taylor brought an action to recover it. Should Taylor recover under these circumstances?

RULING COURT CASE

Green vs. Wilding, Volume 59 *Iowa Reports, Page* 679; *Volume* 44 *American Reports, Page* 696.

In 1869, C. H. Barton died, owning a large amount of land. He left a widow, Rebecca Barton, and two children, Charles B. Barton, and the plaintiff, who married Green. In 1872, Rebecca, the plaintiff, and Charles sold the land in question to the defendant for $800. At the time of this conveyance the plaintiff was only thirteen or fourteen years of age, and her brother Charles was even younger. When she was nearly twenty-five years old, or four years after attaining majority, the plaintiff brought this action to recover her interest in the property, which she had conveyed as a minor.

Decision: An infant may disaffirm a contract or act upon becoming of age. But unless he exercises this right then, or within a reasonable time thereafter, the right is lost. In this case no reason appears why a delay of four years was made before the plaintiff attempted to disaffirm the sale of her property. Accordingly the Court was of opinion that the plaintiff had waited an unreasonable length of time to disaffirm, and the right was gone. Judgment should be given for the defendant.

RULING LAW

Story Case Answer

Upon becoming of age, or as soon thereafter as possible, an infant should repudiate all contracts and acts made or done during minority. If an unreasonable

length of time elapses after attaining majority before repudiation the right may be lost. This is fair, for otherwise an infant might wait for an indefinite length of time, hoping to take advantage of his voidable acts and contracts.

In the Story Case, the Court would hold that the infant had waited an unreasonable length of time to avoid the contract. He used the horse for several years after he had reached his majority without evidencing any intention to repudiate the obligation.

D. Effect of Disaffirmance

STORY CASE

Mr. Castlemen gave his son George a very fine horse as a birthday present. Several months later the son, who was only nineteen years of age, took the horse to the City Livery Company and offered the animal for sale. The livery company purchased the horse telling George that they would pay him for it on the following day. Before the youth reached home he regretted the sale. He called up the president of the livery company and told him that he had decided to avoid the sale and that he would come for the animal the following morning. That night the livery company's stables burned and George's horse, among others, was lost in the conflagration. The infant then sued the livery company for the price which had been promised for the horse. What judgment should be given?

RULING COURT CASE

Mustard vs. Wohlford's Heirs, Volume 15 *Grattan Reports, Page* 329; *Volume* 76 *American Decisions, Page* 209.

During his minority, one Nisenwander contracted to sell some land to Mustard. The infant gave bond to make a conveyance and Mustard paid a part of the purchase money and went into possession under the contract. Soon after making this contract the infant became dissatisfied and repeatedly declared that he would not affirm the contract when he became of age. When he reached twenty-one years of age, he entered into a second contract of sale for the same piece of land, by which he agreed to sell it to Wohlford. He received a part of the purchase money from him, and thereafter made a conveyance to Wohlford.

After the death of Wohlford this action was brought by his personal representatives and heirs to recover possession of the land. Whether they were entitled to recover the same depended upon whether the second conveyance of the land was a disaffirmance of the first contract to sell.

Decision: The first contract of sale was disaffirmed by the second contract, made after the infant reached his majority. A voidable act of a minor may be avoided by different means, depending upon the nature of the act. It need not be an express disaffirmance. Any act which unequivocally shows an intention to disaffirm is sufficient.

As to the effect of disaffirmance in general, the Court said: "The Court is further of opinion that the effect of such disaffirmance was to render the first mentioned contract void, to extinguish any interest in law or equity that the defendant may have acquired under it, and to entitle Nisenwander, or his vendee, to recover possession of the land in an action at law, and to hold it free from any equity of the defendant.

If the contract was one of sale by the infant, he becomes reinvested with his title to the property, and may demand and recover it, not only of the vendee, but of any other person who may have it in possession. The right of an infant to avoid his contract is an absolute and paramount right, superior to all equities of other persons, and may, therefore, be exercised against purchasers from the vendee."

The Court decided that this land could be recovered by the heirs of Wohlford.

RULING LAW

Story Case Answer

Most obligations imposed upon infants by their contracts are voidable only. They are binding until he elects to repudiate them. If he avoids them, the effect is as if there had never been a contract. If he avoids a sale of real or personal property, title thereto by the very act of avoidance revests in him, and he is then entitled to possession.

In the Story Case, when the infant notified the livery company that he had elected to avoid the sale of the horse, title to the animal revested in him, and the loss was on him, unless it appeared that the livery company was in some way responsible for the fire.

E. Recovery by the Infant of What He Has Paid Under a Voidable Contract

STORY CASE

Frank Jones, a minor of twenty years of age, purchased a small boat from the Chicago Outing Company and paid cash for it. He used the boat for about ten

days, and then decided that he did not care for it. He anchored the boat in the harbor, notified the company that he had decided to avoid the sale and demanded the return of the purchase money. The outing company refused to refund the money. Frank Jones then brought suit to recover what he had paid. He claimed that he was an infant when the contract was made; that he had disaffirmed the contract, and was, therefore, entitled to recover the money he had paid. What should a Court decide?

RULING COURT CASE

McCarthy vs. Henderson, Volume 138 *Massachusetts Reports, Page* 310.

McCarthy, a minor, signed an instrument in writing, acknowledging the receipt of a vehicle from Henderson. For the use of the vehicle he agreed to pay $50 per month. When the payments amounted to $675, with interest the vehicle was to become the property of the infant. The vehicle was delivered to him on payment of $175 and after receiving it McCarthy used it in his business. About a month after the agreement was signed, the minor offered to return the vehicle to the defendant, Henderson. He demanded the return of the money he had paid, but continued to use the vehicle for about four months longer, at which time the defendant refused to take it back. Finally the defendant took the property back but refused to return the money, for the recovery of which the plaintiff brought this action.

Mr. Chief Justice Morton said: "The contract made by the plaintiff was not a contract for necessaries, nor one which was necessarily beneficial to him.

He had, therefore, the right to avoid it at his election. The effect of the avoidance by the plaintiff was to make the contract void *ab initio,* that is, from the beginning; he is in the position of an infant who has paid money under a void contract and without consideration and is entitled to recover it back."

It was therefore decided that the plaintiff could recover the money which he had paid.

RULING LAW

Story Case Answer

An infant has the power to make contracts but he has also the power or right to avoid his contracts during his minority, or within a reasonable time after becoming of age. The disabilities of infants are in fact privileges, for the object is to secure them from damage by their own improvidential acts, but at the same time give them power to contract for their own benefit. If the infant still has possession of the consideration given when the contract was made, he should return this when he avoids or disaffirms the contract. But if the consideration is gone, or has been dissipated, he can demand back what he has given without returning anything. In the Story Case, Jones was entitled to the money he had paid.

F. No Formality Necessary in Disaffirming

STORY CASE

Ralph Bowers, who was a minor, was the owner of a very fine horse. He sold the horse to Mr. Brown and delivered possession to him. Two months later, while still a minor, he went to the home of Mr. Brown

and without notifying him took the horse away and sold it to Mr. Jones and delivered possession to him. When Mr. Brown found out what had been done he demanded possession of the animal from Mr. Jones who refused to give it up. Suit was then brought by Mr. Brown to recover possession of the horse from Mr. Jones. His right to recover depended upon whether the infant had disaffirmed the first sale to him. What should the Court decide under the foregoing circumstances?

RULING COURT CASE

Nicrosi vs. McCarthy, Volume 72 *Alabama Reports, Page* 332; *Volume* 47 *American Reports, Page* 418.

The defendant, McCarthy, was the owner of certain land which adjoined the premises of the plaintiff. During his minority the defendant agreed in writing to permit the plaintiff to construct and maintain a sewer over his land. In pursuance of the agreement, the plaintiff constructed the sewer. When the defendant came of age, or soon thereafter, he stopped up the sewer. In consequence of this act the land of the plaintiff was flooded, causing great damage. This action was brought for damages. The question was whether the act of McCarthy amounted to a trespass and a wrong, or was simply an act of rescinding and repudiating the contract and therefore unlawful.

Mr. Justice Somerville delivered the opinion of the Court:

"There can be no doubt of the principle, that in order to enable an infant to avoid a deed or other executed agreement, no act on his part is necessary during the period of infancy and the authorities are generally uniform in holding that after reaching his ma-

jority he can elect to confirm or disaffirm any voidable executed contract entered into by him while in a state of minority. The usual rule is that any such contract may be affirmed by unequivocally recognizing its continued existence and binding force. So it may be disavowed by some distinct and positive act, leaving no room for doubt as to the intention of the party. This may be effected by notice of disaffirmance, by suit, pleas, or entry upon real estate, or other unmistakable act of dissent, or of confirmation as the case may be."

The act of the defendant in stopping up the sewer amounted to a disaffirmance of the contract.

RULING LAW

Story Case Answer

No particular formality is necessary to constitute a disaffirmance by an infant of his voidable acts and contracts. The disaffirmance may be in writing, or it may be oral; it may consist in words, or it may consist in conduct; it may be by refusing to accept the benefits of the contract, or it may be by returning them. If he has received and squandered the benefits of the contract, he may disaffirm by refusing to pay therefor, assigning as the reason his infancy. In general it may be said that a disaffirmance is any act, conduct, or writing which unequivocally shows an intention on the part of the infant not to be bound by the contract. A contract may be disaffirmed by conduct which is inconsistent with the binding effect of the contract. In the Story Case, when Ralph Bowers went to the home of Mr. Brown and took possession of the horse and sold it to a third person, such conduct was clearly inconsistent with an intent on his part to be bound by the first sale, and such conduct undoubtedly would consti-

tute a disaffirmance of the first sale. Therefore, Mr. Jones had the right to the possession of the horse and Brown could not recover.

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3. Obligations Which Cannot Be Avoided

A. Obligation Incurred for Necessaries

STORY CASE

George Nicoll, while a freshman in college, secured board from Mrs. Reeves agreeing to pay $6 a week therefor. Although he agreed to pay that amount, it appeared that it was reasonably worth only $4.50 per week. At the end of the first month Mrs. Reeves presented him a bill for $24 which he refused to pay. She was obliged to sue him for the money and in defense he contended that he was not liable because he was an infant when he entered into the contract. Should Mrs. Reeves be entitled to recover? If so, how much should she recover?

RULING COURT CASE

Tupper vs. Caldwell, Volume 12 *Metcalf's Reports, Page* 559; *Volume* 46 *American Decisions, Page* 704.

The defendant, a minor, was the owner of a house and lot. He and his mother lived in the house. It was old, dilapidated and badly in need of repairs. The plaintiff, at the request of the defendant, did the necessary repairs to make it habitable.

The defendant refused to pay for the work which was done by the plaintiff and the plaintiff brought this action to recover for the same. To the action the defendant pleaded that he was an infant when the agreement was made and it was therefore not binding upon

him. On the other hand, the plaintiff argued that the plea of infancy was no good because the obligation was incurred for necessaries and that such an obligation cannot be avoided.

Mr. Justice Dewey said in part:

"An infant may make a valid contract for necessaries and the matter of doubt in the present case is what expenditures are embraced in the term 'necessaries.' An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries. And, likewise, for his good teaching or instruction, whereby he may profit himself afterwards. —The wants supplied are, however, personal, either those for the body, as food, clothing, lodging and the like, or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood.

"No authority has been found which in our opinion sustains the position that a minor is liable for expenditures upon his real estate, of the character and under the circumstances here stated." It was therefore decided that the plaintiff could not recover.

RULING LAW

Story Case Answer

No obligation incurred by an infant during his minority is absolutely binding upon him. But there are certain obligations which an infant may not avoid. One of these is for necessaries furnished to him during minority. If an infant were not able to bind himself for necessaries he would have great trouble in getting them and in many instances would be a burden to so-

ciety. The general rule is that an infant is liable on executed contracts for necessaries. When necessaries have been furnished to him the person who furnishes them is entitled to collect therefor. But the infant is not liable upon executory contracts for necessaries; that is, he is not liable for necessaries which he has promised to take. He is not liable unless the necessaries have actually been furnished him.

This seems to be an obligation not based upon the contract, but an obligation imposed by law. He is not necessarily liable for the necessaries in the amount and manner in which he contracted, but the law compells him to pay a reasonable price for them regardless of the price which he promised to pay. What constitutes necessaries is a question of fact for the jury. In general necessaries are only such things as relate to the infant's person or personal needs. This includes food, lodging, clothes, and a reasonable amount of education. In the Story Case, Mrs. Reeves could not recover the contract price for the board if this was unreasonable, but she could recover a reasonable sum therefor.

B. Obligations Imposed on Infants by Law

STORY CASE

When James Brown was eighteen years of age he married Stella Moore. After they had been married a year, Brown desired to be free of responsibility in supporting his wife. It was agreed that she should receive from him a note for two thousand dollars due in one year's time and secured by certain stocks and bonds which he owned, and that she, at the same time, relieved him from giving her the necessaries of life.

Six months later, Brown regretted his agreement with his wife and sought to avoid the contract, to which she refused to consent. He maintained that as an infant he had this right. How should his lawyer advise him?

RULING COURT CASE

People vs. Moore, Volume 4 *Denio's Reports, Page* 518; *Volume* 47 *American Decisions, Page* 272.

There was a statute in New York which provided that the father of an illegitimate child should support such child during its period of infancy. It further provided that every such father should give bond to insure repayment to the City of New York, or to any city in the state, for money expended by any such city for the support of the child, in case the father failed or refused to do so. It was shown that the defendant, while still a minor, was the father of a bastard son. In accordance with the provisions of the statute, he gave bond to insure support of the child. He failed to support the child as required, and this case was an action upon his bond for money spent by the public in taking care of the child. The father contended that the bond was not binding upon him because it was entered into while he was still a minor.

Mr. Chief Justice Bronson said in part: "When an infant is under legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation."

In this case, since the statute imposes upon him the obligation to support the child in question, it was held that the bond was binding upon him, and judgment was given against him.

RULING LAW

Story Case Answer

The legislature of a given state may, at its discretion, impose obligation upon infants. If it does, any contract, note or bond made by the infant to fulfill such legal obligation is binding upon the infant notwithstanding the fact of infancy, if such contract be fair and reasonable. Since a husband is liable to his wife for the necessaries of life, any contract made by him with reference thereto cannot be avoided by him even though he is an infant. Since the note given by Brown, in the Story Case, was executed to fulfill this obligation imposed upon him by law, he cannot later avoid or disaffirm it.

C. Estoppel

James Stone was the owner of considerable property in the town in which he lived. Although only a little over nineteen years of age, he was always taken to be at least twenty-two or three years of age. Desiring to purchase a motor cycle he went to the store of Mr. Atchinson, a dealer in motor cycles, and told him his desire. He asked that he be given credit for a few days. Mr. Atchinson knew he was a young man owning some property but did not know that he was under age. When he was questioned, James Stone assured Atchinson that he was of age. He purposely lied about his age hoping to defraud the dealer if possible. Upon the strength of these representations, Mr. Atchinson sold him the machine on ten days' credit. He left the machine on the street, where it was stolen. He then refused to pay the dealer the purchase price. Action was brought by Mr. Atchinson to which the

minor replied that he was a minor and not liable upon the contract. Under the foregoing circumstances can James Stone be held on the contract?

RULING COURT CASE

Cobbey vs. Buchanan, Volume 48 *Nebraska Reports, Page* 391; *Volume* 67 *Northwestern Reporter, Page* 176.

J. E. Cobbey sued Elmer Buchanan for certain professional services which he had rendered on behalf of the defendant and at the defendant's request. The suit was for fifty dollars. It was contended by the defendant that at the time he made the request he was a minor, and unable to enter into a binding contract of this kind. The plaintiff contended that the defendant was liable because he falsely and fraudulently represented that he was of age upon which statement the plaintiff had relied, and as a consequence therefrom had suffered damages.

Decision: The general rule is that an infant is not estopped to set up his infancy as a defense to a contract. The Court after stating as to the general rule said, however: "We are aware that there are cases holding a party estopped from asserting the defense of infancy when he had procured some advantage, benefit, or property by fraudulently representing himself to be of age, and where the other party had believed in, relied upon, and acted on such false representation made by the infant as to his age; to estop him from asserting infancy as a defense, the representation must have been fraudulently made by the infant, and believed in, relied on, and acted upon, by the other party."

Since it was not shown that the plaintiff relied upon the representations in this case, it was held that the infant was not liable.

RULING LAW

Story Case Answer

As a general rule, the Courts will not say that an infant loses his defense of infancy because he has told an untruth about his age. This would obviate the very protection which the law is giving to the infant. Certainly the infant cannot be estopped, that is, denied his protection, by the acts or admissions of other persons such as the misrepresentations of a father, guardian or friend. Some states, however, hold that when the other party has acted in good faith and the infant appeared of age and apparently of discretion to contract, and when the infant has expressly misrepresented his age, and the other party has relied thereon, the infant cannot avoid his contract. In these states, Stone, in the Story Case, would be liable on his contract. In most states, however, he could put in defense that he was an infant and Atchinson could not recover.

D. Right to Disaffirm Is Personal to the Infant

STORY CASE

John Newcomb was the owner of a valuable diamond ring. He sold it for a very low price to a friend, Nathan Lane. When the father of Newcomb discovered what his son had done, he went to Lane and demanded the return of the ring. Lane refused to give it. The father brought suit to recover it, alleging that his son was a minor and that a sale of the ring was voidable,

and that he, the father, had elected to avoid the sale. Assuming that John had done nothing to avoid the sale, is the father entitled to recover the ring?

RULING COURT CASE

Patterson vs. Lippincott, Volume 47 *New Jersey Law Reports, Page* 457; *Volume* 54 *American Reports, Page* 178.

By a contract in writing, Barclay Lippincott, acting as agent for his minor son, George, agreed to purchase from Patterson the exclusive right to use, manufacture and sell the plaintiff's patent, an air heating attachment, in Atlantic County in the State of New Jersey. Not having been paid the purchase price for the patent, the plaintiff brought this action against the defendant, who acted as agent for his son. The plaintiff contended that he was entitled to recover from the father, because the father had acted for an incompetent principal whose contracts were voidable, and that, therefore, the father, as agent, should be liable upon the contract.

Decision: This contract as made by the defendant, acting as agent for his son, was binding upon the son until the son himself avoided it. The right to avoid the contract is personal to the infant while he lives. No one else can exercise that right for him.

Mr. Justice Scudder, who delivered the opinion of the Court, said: "Another answer is that the defense of infancy to this contract with the plaintiff can only be set up by the infant, or those who legally represent him. Infancy is a personal privilege of which no one can take advantage but the infant himself. In this case the plaintiff seeks to disaffirm the infant's contract and sue a third party on the contract, whose au-

thority to bind the infant has not been denied. The contract made by the father is valid, so far as the plaintiff is concerned; the infant was competent to act as principal; he did not avoid the contract, and the plaintiff cannot avoid it."

It was held that this action could not be maintained against the defendant, since he acted for a proper principal.

RULING LAW

Story Case Answer

The law gives the minor the right to avoid certain contracts as a means of protection to himself. It follows that this right is personal to the infant. So long as the infant is satisfied with the transaction no one else is entitled to complain. As long, therefore, as the minor lives and does not choose to avoid voidable acts and contracts no one else may do so. After his death the right of the minor to avoid rests solely in his personal representative, i. e., in his administrator or executor. In the Story Case, the father of John Newcomb could not avoid the contract. This was a right existing in the infant alone.

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4. Acts of Disaffirmance by an Infant

A. Act of Disaffirmance Necessary

STORY CASE

Henry Myers, an infant, sold his automobile to Howard Long. Long paid a reasonable sum for the machine. Shortly after this sale was made, John Burnett secured a judgment against Myers for a debt which Myers had refused to pay. This money was owed for necessities delivered by Burnett. When the judgment

was secured, Burnett tried to levy an attachment on the automobile saying that since Myers was an infant the contract of sale could be avoided, and the property treated as belonging to Myers. Is Burnett right in this procedure?

RULING COURT CASE

Cogley vs. Cushman, Volume 16 *Minnesota Reports, Page* 354.

Cogley, an infant, bought a threshing machine of Cushman. Cogley paid Cushman $100 in cash and gave a note for $700. The notes were secured to Cushman by a mortgage in the threshing machine and two horses. The notes stipulated that Cushman had the right to sell the machine and horses and thereby secure payment of the $700 if Cogley defaulted in the payment. Cogley did default and Cushman took the machine and horses, and sold the horses. Cogley brings this action for the conversion of the horses, claiming that as an infant he had the right to avoid the contract and Cushman had no right to take the horses.

Justice McMillan gave the opinion of the Court:

There is no evidence that Cogley by any act disaffirmed the contract before the time when Cushman took the horses and sold them under the mortgage. At the time this was done the contract was still in force and Cushman could act thereunder. Had Cogley at any time prior thereto indicated his desire or intention to disaffirm, then the contract would have been entirely at an end. Title to the threshing machine would have revested in Cushman and he would have no right to take the horses. The disaffirmance of the contract

by some act prior to the removal of the horses was necessary to make this act of Cushman lawful. As it stands, the taking of the horses was lawful under the contract since it had not been disaffirmed. Judgment was given for the defendant.

RULING LAW

Story Case Answer

In the case of a contract made with an infant which has been completed, the infant must, if he desires to avoid it, do some overt act showing his intention to disaffirm; otherwise the contract is in full force and he is bound. Of course third persons must also comply with the contract. Therefore, in the Story Case, since Myers did not disaffirm the contract with reference to the automobile, it was in full force, and Burnett could not treat the automobile as the property of the infant.

B. Appropriate Act

STORY CASE

Howard Roe, an infant, sold an automobile which he owned, to William Sykes, giving possession of the machine to Sykes. Two days later Sykes left the automobile in the town square of the city, in which the parties lived, while doing several errands. In the meantime Roe and a friend, Harry Cloud, passed by and seeing the machine, Roe offered to sell it to Cloud. Cloud purchased the machine and drove away with it. When Sykes discovered who had the automobile he had Cloud arrested for taking it. Cloud's only defense was that he purchased from Roe. Is this a good defense?

RULING COURT CASE

Chapin vs. Shafer, Volume 49 *New York Reports, Page* 407.

George Chapin, an infant, executed a chattel mortgage upon his horse to the defendant, Shafer, to secure a prior indebtedness. Thereafter, but on the same day, he sold and delivered the same horse to his father, the plaintiff, E. Chapin. When the mortgage matured the defendant took the horse from the possession of the plaintiff. The plaintiff then brought this action to recover the horse from the defendant.

Decision: The mortgage by the infant was voidable. Consequently he was able to disaffirm it at any time during minority. Any act evincing the intent to disaffirm is sufficient. In this case the absolute sale, made after the mortgage was executed, was an unequivocal act of disaffirmance. This being true, the mortgage became void and whatsoever interest the defendant had acquired revested in the infant. The sale to the infant's father was good. The plaintiff was entitled to recover of the defendant the possession of the horse.

RULING LAW

Story Case Answer

No particular formality or procedure is essential in a disaffirmance by an infant. It may be made in writing or it may be oral. It may be by statements made by the infant, or it may be gathered from his conduct. Words, acts and conduct which evince an intention to disaffirm are sufficient. Anything done by the infant which is inconsistent with the desire to remain bound by the contract will constitute a disaffirmance.

An infant may disaffirm the sale of real property by refusing to give up possession, if he retains it; or if

possession has been delivered to a third person, he may disaffirm by entering upon the land and claiming it as his own. The same rule will apply to the sale of personal property. When property, real or personal, has been sold to him, he may disaffirm by refusing to accept the property; or, having accepted it, a return of the property to the owner constitutes a disaffirmance.

In the Story Case, Roe had the right to disaffirm the contract in the manner he adopted. Therefore Cloud was acting within his rights when he purchased the machine, and drove away with it. Hence his defense was good.

C. Obligation to Return Benefit

STORY CASE

Joseph Hulbert, an infant seventeen years old, had been given a valuable horse which he sold to Harold Sherman for $400. Sherman paid Hulbert in cash and the latter purchased an automobile with the money. The day following the purchase of the machine, it was destroyed in a collision with a heavy dray wagon. Thereupon Hulbert went to Sherman and demanded the return of the horse without offering any money to Sherman. Can Sherman be compelled to surrender the horse without getting anything in return?

RULING COURT CASE

Frank Spawls vs. Bullock, Volume 93 *Texas Reports, Page* 188; *Volume* 47 *Lawyers' Reports, Annotated, Page* 326.

Frank Spawls, the plaintiff, was at the age of seventeen persuaded by his stepfather to sell certain land

which he owned in order to obtain money to invest in business with his stepfather. The land in question was sold to the defendant, Bullock. The latter knew that the plaintiff was a minor, but made no objection to the transaction. The plaintiff received $666.66 for his land. This he invested in the business conducted by his stepfather. During the time he was connected with the business he drew out $100 and squandered it. Thereafter he sold the remaining part of his interest in the business to his stepfather. In payment thereof the stepfather conveyed to the plaintiff property reasonably worth $1,200, but upon which there was a mortgage of $900, which was assumed by the minor. Frank, not being able to raise the money necessary to pay off this mortgage, was compelled to sell the property. He sold his interest therein for $150. He spent this money in a manner not accounted for but it was shown at the time of the trial that he had no part of it, or anything purchased therewith. When he reached full age he instituted this action against Bullock, seeking to recover the land. The defendant admitted that Spawls was entitled to avoid the sale, and recover the land, provided he returned the $666.66 which had been paid him.

Decision: An infant is under no obligation to return any part of the consideration or benefit by him received under a voidable contract, unless it appears that he has the same in his possession or under his control.

Mr. Justice Williams said in part: "That one disaffirming his deed upon the ground that it was executed when he was a minor, must return the consideration, if it is still in his possession or control, is a proposition about which there is no doubt. It may also be true

that, if he has used it during minority for purposes for which the law would permit him to charge his estate, as for obtaining necessaries, he must account for its equivalent."

Since in this case Spawls had no part of the money left in his possession or under his control, and since it was not spent for necessaries, it was held that the plaintiff might recover the land of the defendant, without being under any obligation to return the $666.66 or any part thereof.

Judgment was given for the plaintiff.

RULING LAW

Story Case Answer

Because of the immaturity of infants, the policy of the law is to protect them from the consequences of acts done and contracts made during their minority. This protection is fulfilled in the right given to the infant to avoid such acts and contracts. When an infant offers to return the benefit which he has received under a voidable contract, clearly he should be able to avoid it and recover money by him paid or property conveyed to the other party. The law is clearly to that effect.

If he has the consideration or benefit still in his possession, or if he has expended it for necessaries, he should not be permitted to disaffirm the contract unless he is willing to return what he has received or its equivalent to the other contracting party.

But suppose that the consideration or benefit received by him under the contract has been squandered. Shall the protection be extended to allowing him to disaffirm under these circumstances? The policy of the law is to protect him from the indiscretion of youth.

That he may recover under these circumstances is a proposition concerning which there is some doubt, but the general rule is that he may recover, even though he be unable to restore the consideration or benefit. In the Story Case, Sherman can be compelled to return the horse to Hulbert, and since the latter has lost $400 he need not give anything in return to Sherman.

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5. Recovering the Consideration by the Infant

A. Recovery of Personal Property

STORY CASE

Abel Burnham, an infant nineteen years old, purchased a suit of clothes from Fred Schiller for fifty dollars. The money was paid on the delivery of the clothes. Two days later Burnham ruined the clothes in an automobile accident, and thereupon demanded the return of the fifty dollars paid to Schiller. In a court proceeding Schiller attempted to show that the suit was a necessity. He failed in this because it was apparent that Burnham had an abundance of wearing apparel given him by his father. Schiller did not prove that the sale was fair and reasonable and free from bad faith. Will the Court compel him to return the money?

RULING COURT CASE

Johnson vs. Northwestern Life Insurance Company, Volume 56 *Minnesota Reports, Page* 356; *Volume* 26 *Lawyers' Reports, Annotated, Page* 187.

On the 25th day of October, 1888, the plaintiff, Johnson, who was then a minor seventeen years of age, obtained a policy of insurance on his own life in the

Northwestern Life Insurance Company for $1,000. During the time he held the policy he made eight semi-annual payments amounting to the total sum of $186.32. Immediately after the plaintiff attained his full age he served notice upon the company that he had elected to avoid the contract and demanded the money. The company refused to return the money, and the plaintiff thereupon brought this suit to recover the same.

Mr. Justice Mitchell, in his opinion, said: "Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party; but the burden is on the other party to prove that such was the character of the contract."

Since the defendant did not show that the contract was a fair and reasonable one, and entered into without fraud, it was held that the plaintiff might recover.

Accordingly, judgment was given for the plaintiff.

RULING LAW

Story Case Answer

It is the general rule that a person, upon avoiding sales made by him during minority, may recover all personal property which he has sold or otherwise disposed of. This rule applies to money as well as to other personal property.

He may recover it from the person to whom he sold it or from any other person who may subsequently have bought it in good faith. The infant may recover

personal property without waiting until he becomes of age, as is true in the case of Real Property. In the Story Case, Schiller should have proven that the sale was fair and reasonable and free of all bad faith. Because of the failure to do this, he will be compelled to return the money.

B. Recovery of Real Estate

STORY CASE

John Strawman, an infant nineteen years old, sold his farm to Henry Forgan for five thousand dollars. This sum was paid to him in cash. Strawman used this money to buy a steam yacht which four months later was destroyed during a storm. Immediately thereafter, when Strawman was still nineteen, he demanded the return of the farm on the ground that as an infant he could avoid his contract. Forgan defended on the ground that an infant cannot avoid a real estate contract, and demand the return of land until he has reached his majority; and second, that he must return the consideration given to him. Are these good defenses?

RULING COURT CASE

Manning vs. Johnson, Volume 26 *Alabama Reports, Page* 446; *Volume* 62 *American Decisions, Page* 732.

In this case, the plaintiff, Manning, who was a minor at the time, conveyed by deed certain land to the defendant. At the time of the conveyance the defendant paid to the plaintiff the purchase price therefor. When the plaintiff reached the age of twenty-one years, he elected to avoid the sale. He notified the defendant of his intention and demanded the possession of the

land. It was urged by the defendant that the plaintiff should not be permitted to recover unless he returned the money which had been paid to him for the land. It was shown by the plaintiff that he did not have the money or any part therof, nor was it under his control.

Mr. Chief Justice Chilton said: "If the infant, after he arrives at age, is shown to be possessed of the consideration paid him, whether it be property or money, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time after attaining his majority, this amounts to an affirmance of the contract. So, likewise, if it can be shown that he has power to restore the thing that he received, he cannot be allowed to rescind without first making restitution. But if, as in this case, the consideration paid was money, and there is no proof that he was possessed of the money so obtained, either actually or constructively, after he attained his majority, so as to be able to restore it to the purchaser, the infant shall not be required, in a Court of law, to repay the amount he received as a pre-requisite to an avoidance of his deed by suit for his land." The infant therefore is permitted to retake the land since he has reached the age of his majority, and he need not return the money originally paid him since there is no proof that he has the money now or its direct proceeds.

RULING LAW

Story Case Answer

An infant cannot avoid a real estate contract in the same manner as other contracts when he is the one who sold the land. The general rule is that he can disaffirm as an infant, but he cannot get possession of the

land until he reaches twenty-one. This rule is based on the theory that the buyer cannot run away with the land, or destroy it as he could personal property, and therefore the infant is fully protected when he is permitted to recover after reaching his majority. In the meantime, however, the buyer is accountable to the infant for the profits of the land and any waste that may occur.

In the Story Case, Forgan's first defense is good, and Strawman cannot demand a return of the property until he reaches twenty-one years of age. The second defense, however, is not good. When Strawman reaches his majority he can compel the return of the land without paying anything since the money paid by Forgan is gone, and there are no results to show for it.

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6. Acts of Affirmance

A. What Constitutes Affirmance

STORY CASE

Howard Mix, an infant twenty years old, sold twenty shares of railroad stock to Edward Mills. This stock was of uncertain value and fluctuated on the market to a considerable extent during the course of a few weeks. The sale to Mills was made at the market price. When Mix became of age, the stock was still worth approximately the same amount as he received for it. Six months later it had a quick substantial rise in the market and was soon worth double the amount Mix received. Then Mix informed Mills that he repudiated the contract made while he was an infant and demanded a return of the stock, offering at the

same time to return the money Mills had paid to him. Can Mix do this?

RULING COURT CASE

Goodnow vs. Empire Lumber Company, Volume 31 *Minnesota Reports, Page* 468; *Volume* 47 *American Reports, Page* 798.

The plaintiff, during the period of non-age, sold and conveyed certain land which he owned to the defendant. This was an action to recover the land of the defendant, upon the theory that he, the plaintiff, had elected to repudiate the sale. Three years and a half had elapsed since the plaintiff had come of age and during that time he had taken no steps to disaffirm, nor had he given any notice of an intention to do so. It further appeared that there was no reason why the plaintiff might not have done so. For these reasons it was contended by the defendant that the plaintiff had lost the right to disaffirm.

Mr. Justice Gilfillan said in part: "In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. A reasonable time after majority within which to act is all that is essential to the protection of infants. That ten, fifteen, or twenty years should be necessary as a matter of protection to the infant, is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule, which is solely for protection to infants. Reason, justice to others, public policy (which is not subserved by cherishing defective

titles), and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend upon the circumstances of each particular case, and may be either for the Court or the jury to determine.

"Three years and a half, the delay in this case, after the time within which to act had commenced to run, was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified."

Accordingly it was held that the plaintiff could not recover.

RULING LAW

Story Case Answer

An affirmance by an infant of a voidable contract is a voluntary recognition of the contract, accompanied by a manifest intention to be bound by it. Whether in a given case an infant has affirmed, is a question for the jury to determine in the light of all the circumstances of the case. Obviously, if the infant makes a new promise after coming of age, this will render binding the formerly existing voidable contract. This is true without any new consideration. When the infant, after reaching majority, deals with property or money which he has received under the voidable contract, as if it were his own, such conduct will generally be held to be equivalent to an affirmance of the contract. If the infant makes an unreasonable delay in disaffirming after coming of age, such conduct is very strong evidence of an intention to affirm the contract, but it is not conclusive. In the Story Case, since the property sold was stock in a railroad, and since this stock had a fluctuating value, a reasonable time during which Mix could disaffirm would be much shorter than

if, for instance, the property had been land. Silence during the six months' period would probably be construed as an affirmance, and, therefore, Mix could not recover the stock.

B. Infant's Knowledge of Legal Non-liability

STORY CASE

Fred Christopher, an infant twenty years old, made a contract with Simon Johnson to purchase six horses to be delivered two months later. One month after this contract was made, Johnson inquired of Christopher concerning certain details of the contract. Christopher answered by letter stating how he would pay the purchase price and also gave certain instructions concerning the care of the horses. When this letter was written Christopher had reached his twenty-first birthday. When the time came for delivering the horses and paying for them, circumstances had changed so that Christopher refused to take the horses. He gave as his reason the fact that he was an infant when the contract was made. Johnson, however, maintained that Christopher had ratified the contract after he reached his majority by writing the letter. In the subsequent action Christopher gave, as a further defense, the fact that he did not know that he had any right to avoid the contract when the letter was written, and that the letter was on this account of no effect. Is this true?

RULING COURT CASE

Morse vs. Wheeler, Volume 4 *Allen's Massachusetts Reports, Page* 570.

During his infancy the defendant purchased cattle of the plaintiff for which he promised to pay. Having failed to pay for them during minority he renewed his promise to pay after reaching his majority. This action was then brought by the plaintiff for the price agreed upon. The defendant contended that he was a minor when the sale was made, and the sale was therefore not binding on him. The plaintiff's reply to this was that after reaching his majority the defendant had affirmed the contract by making a new promise to pay. The defendant, however, claimed that his new promise imposed no obligation upon him because, at the time he made it, he was ignorant of the fact that the contract, as originally made, was not binding on him.

Decision: The Court was of opinion that his lack of knowledge as to his previous liability was immaterial. His new promise was a ratification regardless of this knowledge or lack of knowledge, and it was therefore held that the contract was binding on the defendant.

The plaintiff could recover of the defendant the price agreed upon for the cattle.

RULING LAW

Story Case Answer

The law arbitrarily fixes twenty-one years as the age at which an infant is supposed to be able to take care of himself. All contracts made up until that time are voidable. From then on the law removes its protecting arm. If an infant makes a contract one day after reaching that age, however bad the contract may be, the law no longer affords him any protection. If he affirms a contract which was made during his minority, it then becomes binding upon him. This conse-

quence is not affected by the fact that the infant was at that time unaware that the contract was voidable. He has come to years of discretion and his acts and contracts are binding whether they consist in new acts and contracts, or whether they are merely the affirmation of acts and contracts made during the period of non-age.

In the Story Case, the act of Christopher in writing the letter amounted to an affirmance, and this is true although he was ignorant of his right, prior to that time, to disaffirm the contract.

C. Recovery on the Contract as Affirmed

STORY CASE

James Story, an infant, signed a written contract obligating himself to buy a horse from Howard Milliken for $200. Two months later, after he became twenty-one years old, he orally promised Milliken to take the horse and pay for it within ten days. He failed to do this, however, and Milliken brought suit on the written contract. Story put in defense the fact that the written contract was made while he was an infant and, therefore, could be avoided, and that Milliken should have brought suit on the oral promise made after Story became of age. Should Milliken have proceeded in this manner?

RULING COURT CASE

Hunt vs. Massey, Volume 5 *Barnewall & Adolphus' King's Bench Reports, Page* 902.

During his minority, Massey became obligated by a bill of exchange which was drawn on him by the plain-

tiff. After the defendant came of age, and before the bill was due, he wrote a letter to a third person requesting him to pay the bill. Thereafter he refused to allow the third person to pay it and he likewise refused to pay it himself. This action was brought by the plaintiff upon the bill of exchange originally drawn. It was objected by the defendant that the action should not have been brought upon the original bill, but upon the new promise.

Decision: This letter, written by the defendant, was equivalent to a ratification. The effect thereof was not to make a new contract as of the date of the ratification, but to render absolutely binding the voidable bill originally drawn.

It was held that the action was properly brought upon the original bill of exchange, and the plaintiff was held entitled to recover thereon.

RULING LAW

Story Case Answer

The affirmance after reaching majority of the voidable contract of a minor does not create a new contract. It is not an obligation which begins at the time of affirmation. It is the continuation of the contract as originally made. The contract was binding upon the infant, subject to his right to avoid it. If, instead of avoiding it, he affirms it at the proper time, the effect is as if the contract were binding from the beginning.

In the Story Case, Milliken proceeded correctly. The oral promise of Story was not in effect a new contract. It was the confirmation and affirmation of the written contract which he could not thereafter avoid.

7. Effect of Infant's Acts on Right of Third Persons

A. Simple Contracts

STORY CASE

Louis Hansen, an infant, sold a wagon to Henry Lawson. Two days later George Hall took the wagon under a Court attachment as the property of Hansen. This was on a judgment secured by Hall against Hansen for necessities furnished to him. Hall maintained that since Hansen was an infant the sale made by him was voidable and therefore the wagon could be treated as his property. Is this a correct contention?

RULING COURT CASE

Holmes vs. Rice and Dayton, Volume 45 *Michigan Reports, Page* 142.

Ella M. Parks, a minor, was the owner of a fanning mill. During the period of her non-age, she sold and delivered the mill to her mother, Sarah Holmes. Rice had obtained judgment against Lorenzo Holmes, husband of Sarah, and stepfather of Ella. Dayton, acting as deputy sheriff, seized this mill, belonging to Sarah, in satisfaction of the claim against her husband. This could not be done by the law of Michigan. The plaintiff, Sarah Holmes, brought suit to recover the mill or its value.

It was contended by the defendants that the sale by Ella to her mother, being voidable, did not give her such title as would enable her to bring this action.

Mr. Chief Justice Marston said: "The law in recognizing the incapacity of infants to enter into contracts and declaring such contracts voidable does so for the infant's protection. Their contracts are not void, but voidable, and it is for the infant to avoid the contract

or ratify, and not within the power of a stranger—certainly not a wrong-doer—to set up the infant's incapacity to contract as a protection to himself. The contract, though voidable at the option of the infant, is valid as to third persons who are strangers to both parties to the contract and claiming either." Therefore the mother received a good title to the property from the infant, and could validly bring this action against the defendant, who had no right to put in a defense which belongs only to the infant. Accordingly it was held that the plaintiff might recover the value of the mill of the defendants.

RULING LAW

Story Case Answer

It has been stated heretofore that the right to avoid a voidable contract is a right which is personal to the infant. While the infant lives, he, and he only, may avoid the same. After his death, only his personal representative may do so. It follows from this, that the rights of third persons are the same as if the contract were absolutely binding, so long as the infant does not choose to exercise his right to disaffirm.

In the Story Case, Hall did not have the right to avoid the infant's contract, if the infant himself did not choose to do so. Therefore the sale made to Lawson was a good sale and Hall had no right to attach the property as belonging to Hansen.

B. Effect of a Conveyance of Real Estate

STORY CASE

George Borrowman, an infant, conveyed twenty-five acres of land to James Gould, who paid a fair value for the property. Gould conveyed the land to Simon

Blyth, who later sold it to Edward Hilton. Hilton paid twice as much for the land as did Gould when it was first sold. Blyth knew that Borrowman was an infant when he conveyed the property, but Hilton did not. After Borrowman became twenty-one years old, he offered to return the money he had paid for the land and demanded its return. Hilton refused on the ground that he had paid twice the amount Borrowman had received for the land, and also because he did not know that Borrowman was an infant when the land was first sold. Can Hilton build a good defense on these grounds?

RULING COURT CASE

Buchanan vs. Hubbard, Volume 96 *Indiana Reports, Page* 1.

Mrs. Buchanan, at the age of twenty years, eleven months and twenty days, executed to one Pennington a deed to land of hers, for which she was to receive $1,8000. Some time after she had reached her majority she decided that she would avoid the deed because of her infancy at the time she executed it. In the meantime the land had been conveyed to the defendant, Hubbard, who paid full value therefor, not knowing of the fact that there was in the chain of title a grantor who was under the disability of infancy. He, therefore, contended that the land could not be recovered of him, because he was a bona fide purchaser without notice of the defective title.

Decision: The fact that bona fide purchasers have acquired rights does not preclude a grantor from disaffirming a deed made before arriving at full age. The deed of an infant may be avoided whether the land is

held by the original grantor or has passed into the hands of others.

It was decided that the plaintiff could recover the land.

RULING LAW

Story Case Answer

Conveyance of land made by an infant will pass title thereto. This title is, of course, defective, in that the infant may within the proper time, avoid the sale, and demand its return. So long, however, as the infant does not avoid the sale, or if he has affirmed it, the title thereto is as good and valid as if the infant had been an adult when the conveyance was made. The right of the infant to disaffirm is not affected by the number of transfers which have been made since it was conveyed by him; nor is it affected by the fact that the land has been transferred for value to a bona fide purchaser, who had no notice of the fact that some original grantor in the chain of title was an infant.

Therefore, in the Story Case, Hilton cannot retain the land, but must surrender it to Borrowman. The fact that Hilton paid twice as much for it as Borrowman originally received, and that he did not know about Borrowman's infancy is immaterial.

C. Indorsement of Negotiable Paper by an Infant

STORY CASE

Abel Brown executed a promissory note in favor of George Davis, an infant. The note was for $100, made payable to Davis in thirty days' time. Davis indorsed the note by signing his name on the back thereof and delivered it to Frank Hamilton in pay-

ment of a personal debt to Hamilton of that amount. After the thirty days expired Brown refused to pay the instrument on the ground that Davis was an infant and could not pass title or bind himself on the note by indorsement. Would you advise Hamilton to bring an action against Brown or Davis on the note?

RULING COURT CASE

Nightingale vs. Withington, Volume 15 *Massachusetts Reports, Page* 272; *Volume* 8 *American Decisions, Page* 101.

One Vose had been employed by the defendant, Withington. In payment for his services the defendant gave to Vose a promissory note, knowing that Vose was a minor. Vose accepted the note in payment of his services. He indorsed it in blank, i. e., by signing his name to Bacon. He in turn transferred it to the plaintiff, who knew, as did Bacon, that Vose was a minor. When the note fell due, the defendant refused to pay it, and suit was brought thereon by the plaintiff. The defendant contended that he was not liable on the note, because he had paid the sum to the father of the infant, which discharged the obligation. He also contended that the note held by the plaintiff was not good because an infant cannot pass title to negotiable paper by indorsement.

Mr. Parker, Chief Justice, said: "That an infant may indorse a negotiable promissory note, or a bill of exchange, made payable to him, so as to transfer the property to an indorsee for a valuable consideration, seems to be well settled in the law merchant, and is in no way repugnant to the principles of the common law."

Accordingly, it was held that payment to the infant's father did not discharge the obligation, and that the plaintiff received title to the note, and was entitled to recover the amount thereof.

The rule is that an infant can transfer and pass a negotiable note, and no one, except the infant himself, can put in the defense of infancy, and he can do this only when suit is brought against him on the note.

RULING LAW

Story Case Answer

A negotiable instrument is a right to money which passes from hand to hand in a manner similar to the way in which money is passed. Title is said to pass by indorsement or delivery of the instrument. If such an instrument is made payable to one who is an infant, and he then indorses, or if an instrument is indorsed to an infant, who indorses to another, title passes even though he is an infant.

No one can set up the defense of infancy except the infant. In the Story Case, therefore, Hamilton can hold Brown liable on the instrument because he could not put in the defense of infancy on the part of Davis, the payee and indorsee. Davis passed title to the note by indorsement, although if he himself were sued on the note, he would have the defense of infancy.

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8. Civil Wrongs Committed by Infants

A. Wrongs Not Arising From a Contract

STORY CASE

Henry Pugh, an infant fourteen years of age, carelessly drove his automobile into a wagon belonging to Edward Miller, damaging the wagon to the extent of

fifty dollars. Miller demanded of Pugh that he compensate for this loss and the latter refused to pay anything. Thereupon Miller brought suit for all the losses suffered. Pugh admitted that he caused the damage, but stated that since he was an infant he was not liable, and Miller could not recover. Is this a good defense?

RULING COURT CASE

Conway vs. Reed, Volume 66 *Missouri Reports, Page* 346; *Volume* 27 *American Decisions, Page* 354.

The plaintiff and defendant, both of whom were infants, were out playing together with a gun. By the negligence of the defendant, the gun was discharged; resulting in serious injury to the plaintiff. The plaintiff brought this action, claiming damages for the injury. The defendant contended that he was not liable because he was an infant.

Decision: An infant is liable for his negligent wrongs in the same manner as is an adult. The fact that he is an infant should not relieve him of liability for damages which he has negligently caused.

Accordingly, it was held that the plaintiff might recover damages of the defendant for the injury sustained.

RULING LAW

Story Case Answer

An infant is liable for all his civil wrongs to the same extent that he would have been had he been an adult when he committed the wrong. If he is guilty of assault and battery on another, or trespasses upon property belonging to a third person, he is liable for the damages which result from his wrong, and the defense of infancy will not relieve him from liability.

Even if a minor acts in the presence of, or at the order of, his parent, he will be liable nevertheless, though his parent may also be jointly liable with him.

In the Story Case, Pugh is liable for all the injury and loss caused by his negligence, and his plea of infancy is not a good defense.

B. Wrongs Arising From a Contract

STORY CASE

William Edwards, an infant eighteen years old, hired a horse and wagon from the Jackson Livery Company for the purpose of driving to Winchester, a town five miles away. Instead of driving only to Winchester and retaining the horse for one day as he had agreed to do, Edwards went to Aurora fifteen miles away and had possession of the horse for three days. The Jackson company brought suit against Edwards for damages resulting from this wrong. Edwards put in defense that he was an infant and not liable on this contract for hire made with the company. The company stated that it did not bring its suit on the contract but for the wrong done by the infant. Can the company recover?

RULING COURT CASE

Fitts vs. Hall, Volume 9 *New Hampshire Reports, Page* 441.

The plaintiff was a wholesale dealer in hats. The defendant, wishing to purchase a consignment of hats from the defendant, falsely and fraudulently represented that he was of full age and legally competent to contract. As a matter of fact he was not of full age.

The plaintiff, however, acting reasonably and in good faith, relied upon the representations of the defendant and sold the goods desired. In payment therefore he received a note made by the defendant. At maturity of the note, the infant refused to pay for it, and thereupon this action was brought in *deceit* for damages. It was contended by the defendant that he was not liable because he was an infant when the representation was made.

Decision: This action was not brought upon the contract, but it is an action in deceit for damages. Though an infant may avoid his contracts when not made for necessaries he is liable for civil wrongs. This is true even though the indirect result be that the contract is enforced against the infant.

RULING LAW

Story Case Answer

We have seen that generally an infant is not held liable on contracts made by him during his minority, unless they are contracts made for necessaries. Also, an infant is not relieved from civil liability for damages arising from his civil wrongs, or torts, because of his infancy. However, when the civil wrong arises from, or is connected with, a contract, a different problem presents itself.

To enforce the civil liability in every case of this kind, would deprive the infant of a large degree of the protection which is given him by law. On the other hand, a great deal of injustice may be perpetrated upon third persons if he escapes from all civil liability in such cases.

If the wrong complained of is such that it would have been a wrongful act regardless of the contract, he may

be held for damages even though the indirect effect of enforcing the liability is to enforce the contract. If however, wrong consists solely in the breach of the contract, liability for damages will not be enforced against an infant.

In the Story Case, there was wrongful intent on the part of the infant and there was more than a mere breach of contract. There was a positive departure from the object of the contract, a positive and willful wrong, apart from the contract and for this the infant is liable.

II. PARENT AND CHILD

1. The Custody of the Child

A. Possession of the Child

STORY CASE

The wife of Charles Williams died leaving him with two children, eight and ten years of age. A few months after this occurred Williams became a man of dissolute habits and within a short time failed altogether to provide for the children. Thereupon, Andrew Temple, the father of their mother, took the two children, and being a man of ample means, gave them a good home and training. After a course of two years, Williams completely changed his habits and became a man of sober habits and industry. He established a small home and requested the return of his children. Temple refused to give them up, saying that he was more capable of giving them a good home and that the children were happy and satisfied. Thereupon Williams brought suit for the possession of the children. What should the Court do?

RULING COURT CASE

Stapleton vs. Poynter, Volume 111 *Kentucky Reports, Page* 264; *Volume* 53 *Lawyers' Reports Annotated, Page* 784.

Christena Poynter married one W. R. Stapleton in the year 1888. He was a man of dissolute habits. He was worthless and did not properly support and care for his wife and family. For these reasons his wife left him taking with her their three children, and went to live at the home of her father-in-law. Her father-in-law was unwilling and unable to support her and her children. She, accordingly, sought and found work as a domestic servant in the same community. Desiring to have her children with her, she went to live with her own parents, who lived in an adjoining county, taking the children with her. The father-in-law of Christena, and grandfather of the children, took a great fancy to one of the children. He went to Christena under the pretense of reconciling the differences between her and her husband, with a view to having them live together again. Under this deception she allowed him to take this child, which he carried home with him and she agreed to his keeping it until she and its father should live together as man and wife. W. R. Stapleton, however, refused to live with Christena again; and soon thereafter died.

Christena, who after the death of her husband, assumed the name of Poynter brought this action to recover possession of her child from its grandparents. It was contended by the grandparents that they should be permitted to retain possession of the child, because they were better able than the mother to care for and

educate the child and that the child did not wish to return to its mother.

Decision: The mother of a child is its natural guardian if she is a person of thrift, character, and has love for the child. She has a superior right to any third person to have possession of the child, even though third persons may have greater wealth, and are more able to give such child the luxuries of life.

RULING LAW

Story Case Answer

Because of the natural relation which exists between parent and child, it is universally admitted that the parents are entitled to the custody of their children. However, for good reason shown, courts may interfere and take from the parents this natural right. Courts will do this when the parents are manifestly unfit or incompetent to properly care for and train their children.

As between mother and father, custody of their offspring is regarded as a joint right: but in the case of separation, all other things being equal, the right of the father is paramount to the right of the mother. If it appears that the child will be better cared for and trained by its mother, the Court will generally give the mother custody. In determining whether the mother or father shall have possession of the children, the primary consideration is the welfare of the children.

From what has been said it follows that, as against third persons, however closely related to the child, the natural parents have the right to the custody and possession of their children. This is true even though the child may prefer to live with such persons and even though it may appear that such persons are more com-

petent and more able, to rear the children properly. So close is the bond between parent and child, that a Court will not sever the bond in favor of a third person, unless the parent is manifestly unfit and unable to bring up his children in a proper manner.

If, in the Story Case, the Court is satisfied with the responsibility and integrity of Williams, the judge will deliver possession of the children to their father, and this is true altho the father could not give them as luxuriant a home as could their grandfather.

B. Control of the Child

STORY CASE

Frank White, an infant nineteen years of age, who was living with his parents, was requested by his father to do an errand for him. The request was reasonable, but Frank refused to comply. Thereupon, the father asked an older brother to use force in holding the delinquent brother while the father administered punishment. The father used a leather whip and beat the son severely, but did not in any way permanently injure him. Following this, Frank employed a lawyer and brought an action for damages against both his father and older brother. Can he recover?

RULING COURT CASE

Rowe vs. Rugg, Volume 117 *Iowa Reports, Page* 606; *Volume* 94 *American State Reports, Page* 318.

In this case it appears that the mother of the plaintiff, Rowe, who was an infant, authorized her sister, and aunt of the child, to punish the child for some wrongful conduct. It appears that the aunt adminis-

tered the punishment in a reasonable way and that the punishment administered was not excessive but the child brought this action against her for damages.

It was contended by the defendant, the aunt, that the mother, being equally entitled with its father, to the control of the child, was entitled to administer punishment, and that such being the case, she was entitled also to delegate such authority to some third person.

Decision: Under the code of the State of Iowa as at common law, it is provided, as contended by the defendant, that the mother has equal right with the husband to control and possession of their minor children. Consequently, the mother is entitled to administer reasonable punishment in cases where punishment is necessary. If she has this right, there is no reason why she should not be permitted to delegate the right to some person in whom she has confidence, provided it is done in good faith and the punishment administered is reasonable and not excessive.

Accordingly it was held that the defendant was not liable in this action.

RULING LAW

Story Case Answer

Parents are responsible to society for the well-being, education, training and integrity of their offspring. Accordingly the law has lodged in them the right and power to control their children in such manner as seems best to the end in view. The power of the parents in this respect is unlimited except that nothing may be done by the parents which will endanger their children physically or morally. So the father, and in his absence or in case he is dead, the mother, has the right to direct his physical, mental and moral training,

to choose his associates and supervise his general conduct.

In the Story Case, the father had the legal right to severely chastise the son, if the father acted in good faith and did not permanently injure him. Also, the father had the right to request the aid of the older brother, and neither is liable for the punishment inflicted.

C. Discipline of the Child

STORY CASE

Arthur McLain, an infant fourteen years of age, was severely tho not permanently, punished by Ethel Forbes, his school teacher, for his delinquency and deportment in the classroom. The chastisement consisted of the use of a raw-hide about one-half an inch in diameter, administered across the back. After the child returned home, the parents learned of the treatment, and demanded damages of the teacher for action. In a Court proceeding, the teacher defended on the ground that she was standing in the place of the parents at the time and had the right to administer punishment under the circumstances. Is this a good defense?

RULING COURT CASE

Fortinberry vs. Holmes, Volume 89 *Mississippi Reports, Page* 373; *Volume* 42 *Southern Reporter, Page* 799.

In this case it appears that Rose Fortinberry left his infant daughter with the defendant, Marshall Holmes, to be supported, educated, cared for, and treated as his own child.

On one occasion the defendant punished the child for some misconduct. This was an action brought by the child's parent for damages caused by the alleged wrongful punishment.

Decision: It is conceded and is plainly the law, that if Holmes stood in *loco parentis* (in the place of the parents) there could be no civil action by the child. It is also conceded, as is clear from this record, that he was in that relation unless it was changed by the testimony of the parent to the effect that she had given instructions that the daughter was not to be whipped. This does not alter the relation or change the status of the child, who was to be taken and treated as one of the children of the family.

So it was held that the plaintiff could not recover.

RULING LAW

Story Case Answer

In order that the power of control over minor children may be efficiently exercised, parents are given the right and power to punish and chastise, in a reasonable manner, their children because of their misconduct. This is a discretionary right with the parents and may be exercised by either one. In case either abuses the right, by inflicting punishment of a cruel and unreasonable kind, such parent may be held criminally liable.

In case a parent sees fit, he may delegate to another, the power and right to punish and chastise his children. The person to whom this power is given, stands in the same relation so far as the right of punishment is concerned, as the parent to the child.

A person who assumes the duties and responsibilities over a child has the right to inflict moderate punishment. He may do this even though it appears that

the parent or parents of the child expressly forbade the child being punished.

In the Story Case, the teacher had the control of the child during school hours and during this time stood in the place of the parent. Therefore, for the purpose of disciplining the child, the teacher could punish him, and for this she is not liable unless she acted in bad faith or the punishment was cruel and unreasonable.

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2. Maintenance of the Child

A. Support by the Father

STORY CASE

Edith Hudson, the wife of Henry Hudson was persuaded by her parents to leave her husband. She took with her their two children, four and six years of age. Henry Hudson was an irresponsible and dissolute man and had failed to provide properly for his family. When the mother and children went to live with her parents, her father gave each of the children sufficient money for their maintenance. Nevertheless, at the end of four years time, when Henry Hudson had by an unexpected event of fortune acquired some money, his wife brought suit against him to recover for all the necessaries furnished to the children to that time. Can she recover?

RULING COURT CASE

Gilley vs. Gilley, Volume 79 *Main Reports, Page* 292*; Volume* 1 *American State Reports, Page* 307.

The plaintiff and defendant in this case had been husband and wife. The defendant deserted her and she obtained a divorce on grounds of desertion and non-support. In the decree of divorce nothing was

said about the care, custody and support of the children of the union. From the time that the divorce was granted, it appeared that the wife, the plaintiff, had supported the children of the union. She now brings this action against the defendant for necessaries which she had furnished to the children during this time.

Decision: The father of the children, because of the natural relation which exists between him and the child, is under a legal duty to support them during their minority. If he refuses to do so and a third person furnishes necessaries to such minor children, such third persons are entitled to recover therefor from the father. This duty of the father to support the children is not affected by the fact that he has been divorced from his wife.

It was held that the plaintiff was entitled to recover of the defendant the money by her paid out in furnishing necessaries for the children born during the marriage relation between the plaintiff and defendant.

RULING LAW

Story Case Answer

Unless children are cared for and properly supported by their parents, they eventually become a charge upon and a menace to society. Because of the natural relation existing between parent and child, society imposes upon them the duty of supporting their offspring. This social duty has been made a legal duty and parents are legally obliged to care for and support their children during minority, if the children remain in their care and custody.

If the father fails or refuses to provide the proper necessaries of life for the well being of his infant progeny, third persons furnishing the same to the chil-

dren, are legally entitled to collect or recover the value thereof from the parents. The father who is able to do so is bound to maintain and educate his children at his own expense, altho the children may have property of their own sufficient for the purpose, as is true in the Story Case. Therefore Hudson is liable to his wife in the suit brought to recover an amount expended for the children for necessaries.

B. Education of the Child

STORY CASE

William Benidict, the husband of Clair Benidict, died leaving her with two boys eighteen and twenty years of age. By his will, Benidict gave his wife three-fourths of his estate which amounted to property worth about forty-five thousand dollars. To each of the children he gave one-eighth interest, amounting to, approximately, eight thousand dollars each. After the death of their father, the children supported themselves out of their inheritances. Later, on reaching their majority, each of them brought suit against the mother for an amount covering the expense of necessaries consumed from the time the father died until each of them became twenty-one years of age. The mother refused to pay, saying that the children had sufficient to maintain themselves. What will the Court do?

RULING COURT CASE

In the Matter of the Final Account of Louisa Besondy, Guardian.

Louisa Besondy was the wife of John W. Perry, who died in 1863 in the service of the United States leaving

his widow Louisa Perry, and an infant of the age of three years. In 1864 Louisa married Charles Besondy and thereupon the infant became entitled to a pension from the United States Government. The infant continued to live with his mother and stepfather. The mother was appointed guardian, under a bond. She received the pension money and applied it for the support of the infant. In 1874 she died and now, in making a final accounting, the question is whether the person who became her surety under the guardian bond is liable for the pension money which she used for the infant's support, on the ground that the mother must support her infant children out of her own resources.

Justice Vanderburgh gave the opinion of the Court: "The father is bound to support his minor children if he be of ability, even tho they have property of their own; but this obligation in such case does not extend to the mother. The rule is not so rigorous in the case of the mother; and if the child has property, the mother is not bound to provide for its maintenance where the father would be. She is entitled to have the minor's income applied thereto. Therefore the surety is not liable for the amount applied from the pension to the child's support.

RULING LAW

Story Case Answer

The mother is not liable for the support of the children when their own property is sufficient for the purpose and ample provision is otherwise made for their support. It has even been held that this is true where they are able to earn their own support.

In the Story Case, therefore, the mother is not liable to her sons, since they have property of their own with which to maintain themselves.

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3. Right to Earnings and Services of the Child

A. Right of the Parent to His Earnings

STORY CASE

James McBrinde an infant fourteen years of age became so renowned a musician that his talent was in demand in many cities. In January 1914 McBrinde's father assigned to Edward Reynolds the entire earnings of his son for a year for three thousand dollars. In March 1914 McBrinde's father died and the son refused to permit Reynolds to collect the profits of his recital engagements, and refused to do the bidding of Reynolds. Has the latter any redress?

RULING COURT CASE

Osborn vs. Allen, Volume 26 *New Jersey Law Reports, Page* 388.

This was an action by Osborn against Allen to recover from the latter compensation for work and labor of her son, an infant, done and performed for the defendant and at his request.

It was contended by the defendant that an action cannot be maintained by a mother, the father being dead, for the services of a minor child. It appeared in the evidence that the minor was a member of his mother's family and that for ten years the mother had had the sole charge of the family; that the minor son worked out from home, his mother receiving his wages, and that his washing and mending were done at home.

Mr. Chief Justice Green delivered the opinion of the Court in which he stated: "By the law of this state, while she, the mother, remains unmarried, she has a right to the services of a minor child for whom no guardian has been appointed, so long, at least, as the child remains under her protection. Within these limits, the right of the mother to the services of her children is the same as that enjoyed by the father."

It was therefore held that the plaintiff might recover of the defendant in this action.

RULING LAW

Story Case Answer

We have just seen that the parents are legally compelled to support their children during minority. As a kind of compensation for this, the law gives to the parents the right to the earnings of the children during their minority, so long as the latter remain within the care and control of, and are supported by, their parents.

The father has the sole right to the earnings so long as he lives and performs the duties of a father towards the children. After his death, or after he has left his home and refuses to continue the performance of his duties as the head of the home, the mother is entitled to collect the earnings of the children.

In the Story Case, Reynolds has not any right to the earnings of James McBride, because Reynolds received only the rights which the father possesses, that is, the earnings until the time of the father's death, or until the infant became of age. Reynolds cannot take more altho he has contracted for the earnings of one year.

B. Right of the Parent to the Property of the Child

STORY CASE

Frederic Hibbert died leaving to his nephew Abel Hill by devise in a will an estate valued at ten thousand dollars. At the time of the Uncle's death the nephew was only fourteen years of age. His father, Simon Hill, was a poor and destitute man who now claimed the property as his own on the ground that all property of an infant child becomes that of the parent. Abel Hill, however, refused to give his father anything. Can his father acquire any of the property in a Court proceeding?

RULING COURT CASE

Magee vs. Magee, Volume 65 *Illinois Reports, Page* 255.

In 1865 the authorities of the county of Cook and of the 9th ward of the city of Chicago agreed to pay the plaintiff $450 under the consideration that he would enlist in the United States army. The plaintiff enlisted and the $450 was paid to the defendant, who was the father of the plaintiff. When the plaintiff returned home, he demanded the bounty of his father. His father refused, claiming that he himself was entitled to it, since the child was a minor. This action was started to recover the money from the father.

Decision: "It is a familiar principle that a father is entitled to the wages and ordinary earnings of his minor son, unless such right has been voluntarily relinquished or forfeited by some act on the part of the father."

The Court proceeded: "No rule of the common law is better settled than that a minor may take property,

real or personal, by gift donation, devise or legacy, and hold the same independently of his father. The money, which is the subject of this action, is what it purports to be—bounty. It was not wages in the ordinary meaning of that term."

Judgment was accordingly given for the plaintiff.

RULING LAW

Story Case Answer

Although the parents are entitled to the earnings of their children during their minority so long as the latter remain within their care and control, they have no right to the property which comes to their children by gift or devise. If an infant wins a prize of $100, his father has no claim whatsoever to the money. Or if an uncle of a minor leaves to him a piece of land by will, this land belongs solely to the child and the father has no right to, or interest in, the property.

In the Story Case, Simon Hill may be ever so destitute; yet he cannot take anything from the child which has come into his possession by way of gift. The father has no right to take anything from the child except its earnings.

C. The Right of the Child to His Earnings

STORY CASE

John McIntyre became insolvent in December of 1913 and thereafter failed to provide for his family as he should. In February 1914, John McIntyre Junior, a son of eighteen years old, made a very lucrative contract with a baseball team to play ball during the following season. Under this contract money was im-

mediately due to the son for services to be rendered. When the creditors of the father learned of this they immediately tried to attach this money due, on the ground that it was an asset belonging to the father. Is this correct?

RULING COURT CASE

Commonwealth vs. Graham, Volume 157 *Massachusetts Reports, Page* 73.

The defendant, who was a minor, had married without the consent of his parents. After he had been married some time he left his wife and upon the demand of his father gave him most of his earnings. He was indicted under a statute which provided that a husband might be fined in case he did not properly support his wife. He contended that his father had the first claim to his earnings, and that after giving to his father sufficient amount to support him, there was nothing left with which to support his wife.

Decision: "We are of opinion that these circumstances make it necessary to hold that an infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent."

When the parent has relinquished or lost his right to the child's earnings, such earnings belong to the child as against the parent and as against all persons claiming through or under the parent.

Therefore the infant husband should have supported his wife and is liable under the statute for failure to do this.

RULING LAW

Story Case Answer

So long as the infant remains at home and is supported by his parents, in return for the care and support of the parents, the latter are entitled to his earnings. On the other hand, if he leaves home, receives no support from his parents, makes his own way and supports himself, the right of the parents to his earnings is gone. With equal reason, if the infant marries, he assumes a new relationship which is inconsistent with his relationship to his father. He incurs obligations which conflict with his obligations to his father and mother. In such a case the parents are generally held to be no longer entitled to his earnings. His primary obligation is then to care for and support his family and to provide for the future.

In the Story Case, since McIntyre Senior had become insolvent and abandoned his family to the extent of failing to provide for them, he has no right to the earnings of the son. McIntyre creditors can claim no greater rights than the father possessed and therefore they cannot claim the earnings of the son.

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4. Rights and Liabilities of Parents in Respect to Civil Wrong Done to and by Infants

A. Right of the Child for Injuries by Third Persons

STORY CASE

The Kimbell Face Cream Company used a portrait of Helen Dunn, a girl of great beauty, on one brand of its face creams, calling the cream "Helen's Choice". This was done without the consent of Miss Dunn, who was seventeen years of age, and also without the con-

sent of her parents. When the company refused to discontinue the use of this picture, Miss Dunn's father brought an action to enjoin further use of the portrait, and also for damages suffered by the use to that time. The company denied that the father had any cause of action, stating that if any right existed, it was alone in the daughter. Is this true?

RULING COURT CASE

Peppercorn vs. City of Black River Falls, Volume 89 *Wisconsin Reports, Page* 38.

In this case it appears that the plaintiff, Peppercorn, was an infant. While walking on the streets of the defendant city he fell and received severe injuries. His fall was caused by the defective sidewalks maintained by the city. Because of the injuries he was prevented from working for several months. He brought this action against the city, claiming damages for the injury. It was contended by the city that the plaintiff could not recover because he was an infant.

Decision: The Court was of opinion that he could not recover for the loss of time during his minority. His services belong to his parents so long as he continues under age and remains under the care and protection of them. Since it appeared that the plaintiff was still in the care and control of his parents, the Court decided that the parents and not the infant, were the proper parties to sue.

NOTE: The Court did not state that the infant could not recover for the injury personal to itself. The Court merely held that the infant cannot recover for loss of time or loss of wages.

RULING LAW

Story Case Answer

So long as a minor remains under parental control, he may not recover for loss of time or loss of earnings because of wrong done to him by third persons, but the infant can recover for the injury personal to himself, that is, primarily for the pain and hurt to himself.

An injury to a child gives rise to two causes of action, one on behalf of the parent and the other on behalf of the child. It follows that a recovery by the parent for the injury and loss which he has suffered, does not bar a recovery by the child for an injury personal to himself; and a recovery by the parent on behalf of the child for the injury personal to the latter does not bar a recovery by the parent for his own loss.

In the Story Case, there was no right as to earnings or compensation involved, and therefore Miss Dunn's father had no cause of action against the company. The injury and wrong coming from the use of the portrait was personal to the daughter, and the suit should have been commenced in her name and for her alone. The answer of the company is therefore correct.

B. Right of the Parents for Injuries to the Child by Third Persons

STORY CASE

While crossing a street in his home town, James Still, the nine year old son of Mrs. Alice Still, was severely injured through the negligence of Henry Hill in running his automobile. James had never earned any money in his life, nevertheless his mother, since the

father was deceased, brought an action for damages for the loss of the child's services, for the expenses incurred and for the worth of her time in caring for the son. Hill put in defense that the child was not earning anything and that the mother could not collect damages, since this was merely a right in the father. Is this defense good?

RULING COURT CASE

Hargan vs. Pacific Mills, Volume 158 *Massachusetts Reports, Page* 402.

The plaintiff was a widow and mother of three minor children, who lived with her and who were supported by her. The eldest, aged eleven, was injured by the negligence of the defendant company. Because of the injury the mother lost the child's services for several months, incurred expenses for medical attention, and spent a great deal of time in nursing and caring for the child during the time he was disabled by the injury in question. She brought this action to recover damages for the loss of the child's services, for the expenses incurred, and for the reasonable worth of her time spent in caring for the child.

Mr. Chief Justice Field said in part: "The tendency of modern decisions is to give to a widow, left with minor children, who keeps the family together and supports herself and them with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her to the extent of her liability, much the same civil responsibility for their education and maintenance, as are given to and imposed on a father. We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother,

and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child so far as they are the consequence of an injury to the child negligently caused by the defendant."

Accordingly it was held that the mother might recover the damages for which she asked.

RULING LAW

Story Case Answer

So long as the infant remains at home and works for his parents, turning over to them all his earnings, the parents are the beneficiaries of his services and earnings. Consequently any injury to the infant which renders his services worthless and impairs his earning capacity is primarily an injury to the parents. This is true also because the parents are still under an obligation to care for him, even though he is no longer able to work. Hence it follows that the parents are properly able to sue for injuries to a minor which have rendered the minor unable to work and earn wages. In such an action not only may the loss of services be recovered but recovery may also be had for expenses incurred in caring for the child during the time he is disabled.

This right primarily belongs to the father; but in case the father is dead, or no longer performs the duties of a father, the mother is put in his place. She is then under an obligation to perform the duties formerly fulfilled by the father, and consequently the law gives to her the right to recover for damages sustained by her infant children and for expenses incurred in

properly caring for them during the time they are unable to work.

In the Story Case, therefore, the mother can recover the damages which she seeks. This is true altho the child was not earning anything at the time of injury. The Court considers that the child has potential possibilities of earning. Of course, the amount of recovery is determined by the jury, after the judge instructs what element can be considered as above outlined.

C. Wrong Done by the Child to Third Persons

STORY CASE

George Miller, twelve years old, maliciously destroyed a number of flower plants on the property of Edward Nobel. The boy was living with his parents, Mr. and Mrs. John Miller and under their control. Nobel demanded of the parents that they pay for the damages committed by their son. The parents refused on the ground that they were not liable in damages for the losses suffered. Thereupon Nobel brought suit against both of the parents to recover for the losses caused by the acts of their son. Can he compel them to pay?

RULING COURT CASE

Paul vs. Hummel, Volume 43 *Missouri Reports, Page* 119; *Volume* 97 *American Decisions, Page* 381.

This was an action for damages for injury to the plaintiff's minor son aged six years, received at the hands of the defendant's minor son, aged eleven years, who resided with and was under the control of the defendant, its father.

Mr. Justice Wagner delivered the opinion of the Court: "A parent cannot be held liable for the wilful trespasses and torts of his infant children, when he neither assents to nor ratifies them. When the minor has committed a tort with force, he is liable at any age to be proceeded against as an adult. I know of no principle of law by which the action is maintainable. There is no such relation existing between parent and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of any other person. The father is not liable for the contracts of the son, within age, except they be for necessaries, and it would be a great departure from the law to hold him responsible for the son's trespasses and wrongs."

Therefore judgment was given for the defendant.

RULING LAW

Story Case Answer

Upon the father is imposed by law the duty to support his children during their minority but the law does not demand that the father shall answer for the civil wrongs of his children. The relationship between parent and child is not such that the father is liable in this respect. The child himself is liable for damages which follow from his wrongful acts. If the father directs the child in the commission of a civil wrong, the parent becomes a wrong-doer just as he would have been had the relationship of parent and child not existed. He is no more and no less liable than he would have been had the person whom he directed been an entire stranger to him.

In the Story Case, the parents of George Miller cannot be made liable for the loss of the flower plants sim-

ply because of the relation of parent and child. Parents are never liable in this manner for the wrongs of their children, unless they have helped in the wrong. Then they are liable as joint wrong-doers.

D. Wrong Done to the Child by the Parent

STORY CASE

Edward Neely unreasonably abused his son, Charles, who was fourteen years of age. Charles started a law suit against his father, through an action brought by an adult friend, to recover damages for the injury suffered. The father admitted that there was unreasonable punishment. He maintained however that the son could not recover because of the relationship of father and son. Is this a good defense?

RULING COURT CASE

Nellie McKilvey vs. W. J. McKilvey, Volume 111 *Tennessee Reports, Page* 388; *Volume* 64 *Lawyers' Reports Annotated, Page* 991.

A minor child, by her next friend, brought this action against her father and stepmother, seeking to recover damages for cruel and inhuman treatment, alleged to have been inflicted upon her by the stepmother at the instance and with the consent of the father.

Mr. Chief Justice Beard, in the opinion of the Court said in part:

"At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect and educate it. These rights could not be forfeited

by gross misconduct on hi part. The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused the child had no civil remedy against the father for the personal injuries inflicted. Whatever redress was afforded in such cases was to be found in an appeal to the criminal law and in the remedy furnished by the writ of habeas corpus."

It was decided by the Court that the child could recover nothing of her father in this action.

RULING LAW

Story Case Answer

At common law a child has no civil remedy against its parents, however unjustly it may be treated and however great damages it may suffer at the hands of its parents. Probably the reason for this is to be found in the fact that policy forbids giving to an infant such a right. If children were given this right many actions would be brought against parents without cause and reason. The result would be to undermine and render feeble the parental control over children.

However, it is to be noted that the parent may not inflict cruel and unjust treatment upon his children and go with impunity. The father because of such conduct, may be deprived of the custody and possession of his child. If his conduct is malicious or aggravated, he may be punished criminally therefor.

In the Story Case, therefore, the son Charles cannot recover any thing in an action against his father altho the father abused him.

III. HUSBAND AND WIFE

1. The Contract to Marry

A. Consideration

STORY CASE

Henry Johnson was divorced from his first wife and was paying her an alimony of fifteen dollars a week according to the decree of the Court. Eighteen months after this divorce decree was rendered, he made an agreement with Alice Young to marry her within a reasonable time providing the alimony which he was paying the divorced wife could be cancelled by decree of court, or could be reduced to ten dollars. His lawyer, thereupon, proceeded to petition for this reduction of the alimony giving reasonable and proper grounds for the reduction. The Court reduced the alimony to eight dollars a week, but Johnson refused altogether to marry Alice Young. She brought an action for breach of promise to marry. Johnson put in a defense to the effect that the contract was void since it contained a condition contrary to good public policy, namely the clause regarding the reduction in alimony. Is this a good defense?

RULING COURT CASE

Noice vs. Brown, Volume 9 *Vroom's New Jersey Reports, Page* 228; *Volume* 20 *American Reports, Page* 388.

The defendant herein was a married man living apart from his wife and seeking a divorce from her. During this time he was devoting his time and attention to the plaintiff. Before the bringing of this action, he promised to marry the plaintiff within a reasonable

time after he had procured a divorce from his former wife.

After getting the divorce he refused to marry the plaintiff and she brought this action, seeking damages for the breach of promise to marry. The defense was that the contract to marry was illegal and consequently not binding.

The mutual promises of the parties to marry constitute a sufficient consideration to make a binding contract. Nevertheless, a promise to marry a person when a divorce from a living spouse shall be obtained is contrary to public policy and therefore void.

Mr. Chief Justice Beasly said: "I cannot see the faintest semblance of legality in the promise here laid. A contract is totally void, if, when it is made, it is opposed to morality or public policy. If a husband can bind himself to a future marriage conditioned on the getting of a divorce, so he can incur similar obligation to be put into effect on the dissolution of his marriage by the death of his wife. Such contracts are highly impolitic and highly scandalous and are, therefore, illegal."

So it was held that the plaintiff could not recover.

RULING LAW

Story Case Answer

When we speak of a contract to marry, we mean an engagement between man and woman to marry at some later time. A contract of marriage or the marriage contract, refers to the relation which exists between husband and wife after the contract to marry has been performed.

In main, the same rules govern the validity of the contract to marry that govern any other simple contract.

The contract, in order to be binding, must be supported by a good consideration. But there is always found a consideration in the mutual promises of the parties. The man agrees to marry the woman in consideration that she will marry him; and these mutual promises make the contract binding.

Like any other contract, the contract to marry will be void in case the promise of one or both is contrary to public policy. It is generally held that a promise to marry when one of the parties shall have secured a divorce, or a promise to marry when one's then living wife shall die is void. Both of these promises are contrary to public policy, and a promise made under these circumstances will not make a binding contract to marry.

A promise to marry conditioned on a reduction of alimony as in the Story Case is not like one contingent on a divorce or death of the wife. There is not the element of bad morals, and the court will probably hold the engagement of Johnson and Miss Young as a good contract. Therefore he is liable for damages because of the breach of contract.

B. Consent

STORY CASE

Andrew Collier and Helen Dufree were attending a social party when it was proposed by a friend at the party that the two become husband and wife. The proposal was made in the nature of a dare but Collier and

Miss Dufree took it up in jest. Collier secured a bona fide license from the county clerk who was present, and then the mock ceremony was had before another friend, James Dunn. Dunn was a justice of the peace and actually qualified to conduct the ceremony although the other parties did not know this and Dunn remained silent on this point. After the mock ceremony he informed the parties of his authority to act in marriages, whereupon they became thoroughly frightened and wanted to know at once if they were really married, when they had no intentions to marry. What should Dunn tell them?

RULING COURT CASE

Roszel vs. Roszel, Volume 73 *Michigan Reports, Page* 133; *Volume* 16 *American State Reports, Page* 569.

The right of the complainant to relief in this case turned upon the legality of the marriage of the defendant with one Christian Zenninger.

This marriage was alleged to have taken place when the defendant was only eighteen years of age. She admits that there was a marriage ceremony performed by Esquire Allen, but she denies that the ceremony ever made her the wife of Zenninger because she never assented to it. She claimed that her parents attempted to force her into a marriage to this man when she was but eighteen years of age; that she told the justice that if he tied the knot forty times it would not stay tied, for she did not like the man and would not live with him. But her objection to the contrary notwithstanding, the marriage ceremony was carried through. The question came up in this case whether this was a valid marriage.

Mr. Justice Champlin said: "It is laid down by Mr. Bishop, in his work upon Marriage and Divorce, that 'the ruling principle as to the constitution of marriage is that it is a mutual contract to the formation of which the consent of both parties must be really, deliberately, definitely and irrevocably given'."

The Court was therefore of the opinion that the foregoing ceremony in no sense constituted a marriage, because there was an entire lack of consent on the part of the woman.

RULING COURT CASE

Jane Tilley vs. Andrew Damon, Volume 11 *Cushing's Massachusetts Reports, Page* 217.

The evidence in this case showed that the plaintiff was delivered of a bastard child, of which the defendant was father. On her complaint a warrant was issued against the defendant by Levi Taylor, Esq., a justice of the peace for the county of Hampshire, directed to the constable of the town of Ludlow, in the county of Hampden, where the defendant lived. The defendant was arrested under the warrant so issued, taken before Taylor, and while thus under arrest, he promised to marry the plaintiff. After being set free he refused to marry the plaintiff and she thereupon brought this action for damages resulting from the breach of promise.

Decision: The warrant, as issued, and under which the defendant was arrested, was void, because the justice of one county has no power or authority to issue a warrant for the arrest of a person living in another county. Such being the case the defendant was unlawfully arrested; and being unlawfully under arrest when he made the promise to marry such a promise

was procured by duress. A promise obtained under duress is not binding on the person. Therefore the plaintiff is not entitled to recover in this action.

It was held that the plaintiff could not recover.

RULING LAW

Story Case Answer

In the formation of the contract to marry, practically the same rules apply which govern the formation of any other contract. We have just seen that such a contract is always supported by a valuable consideration. Furthermore, mutual consent of the parties is essential to its binding effect. If the consent of the woman, for instance, is procured by fraud, duress or coercion, in an action for breach of the contract to marry she has a good defense and no damages may be recovered against her.

It must be noted that there is a wide difference between the reality of consent in reference to the contract to marry and the contract of marriage. What has been said in the foregoing paragraph has reference only to the contract to marry. In other words, it has reference to the situation where the man and woman are engaged to be married as it is termed in a popular sense. When they have married, the relation is then termed in law, the marriage contract or contract of marriage. This will be discussed more fully in another connection.

In the Story Case, not only is there a lack of any consent, for a contract to marry, but there isn't any consent at the time of the supposed marriage. The parties never intended to make a contract to become husband and wife in the future, nor did they enter into

any contract of marriage, because this was not their intention. Therefore the ceremony was of no effect.

C. Action for Breach of Promise to Marry

STORY CASE

Joseph Kilroy had been giving his attentions to Anna Thompson for a considerable period and apparently a warm attachment existed between them. No express promise was ever given by one to the other to become married but apparently it was understood that an engagement existed. When Kilroy was away from Miss Thompson letters passed between them implying an engagement and referring to the time when they should be husband and wife. Suddenly, however, while Kilroy was away from their home town, he married another person and ceased his visits and correspondence to Miss Thompson. Thereupon she brought an action for breach of promise to marry. Kilroy defended on the ground that no express contract to marry existed between them. Is this a good defense?

RULING COURT CASE

Wightman vs. Coates, Volume 15 *Massachusetts Reports, Page* 1; *Volume* 8 *American Decisions, Page* 77.

The defendant herein promised to marry the plaintiff, but before the time set for the marriage the defendant had rendered the performance of his promise impossible in that he had married another woman. It was contended by the counsel for the defendant, in defense to an action brought by the plaintiff for breach of his promise that such an action should not be permitted.

Mr. Chief Justice Parker, in answer to this contention of the defendant, said in part:

"We can conceive of no more suitable application to the tribunal of justice for compensation, than that of a violated promise to enter into a contract of marriage, on the faithful performance of which the interest of all civilized countries so essentially depends. When two parties of suitable age to contract, agree to pledge their faith to each other and thus withdraw themselves from that intercourse with society, which might probably lead to a similar connection with another, the affection being so far interested as to render a subsequent engagement not probable or desirable, and one of the parties wantonly and capriciously refuses to execute the contract, the injury may be serious and circumstances may often justify a claim of pecuniary indemnification. When the female is the injured party, there is generally more reason for a resort to the laws than when the man is the sufferer. Both have a right of action, but the jury will discriminate and apportion the damages to the injury sustained."

It is not necessary that express promises exist between them. A mutual engagement must be proved to support the action; but it may be proved by those circumstances which usually accompany such relationships. The jury may infer from the letters of the defendant, as well as his conduct that an engagement existed. The plaintiff therefore can recover.

RULING LAW

Story Case Answer

An engagement entered into by a man and woman to become husband and wife at some future day is a

contract in the full sense of the word. The consideration for the contract is the mutual promise of each. That is, the law holds that the promise of the man to marry in the future is a legal detriment, and likewise, the promise of the woman. Therefore they are bound to each other in a legal obligation, the wrongful breach of which by one, gives the other an action for damages. It is not necessary that the contract be expressed. It may be inferred from the conduct of the parties, or implied from their correspondence. In the Story Case, Kilroy is liable to Miss Thompson in damages for breach of contract.

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2. Contract of Marriage

A. Common Law Marriage

STORY CASE

Simon Brown was the owner of real estate in Chicago, Illinois, at the time of his death in July, 1914. After his death a dispute arose over the possession of this property between Edna Brown, who claimed to be his second wife, and two children by a former marriage. Edna Brown claimed a dower interest as the widow of Simon Brown. Whether she has a right to this interest depends upon whether her marriage to Simon Brown was legal.

In 1888 two years subsequent to the death of his first wife, Simon Brown visited in Ann Arbor, Michigan. While in that town he met Edna Perry and before he left town, the two agreed to be husband and wife and from that time continued to live together as such. The wedding was not solemnized by any ceremony. The children of Brown by his first wife now claim that

there never was a legal second marriage and therefore Edna Brown could not claim any dower interest. Which is correct?

RULING COURT CASE

Weister vs. Moore, Volume 96 *United States Reports, Page* 76.

This was an action in ejectment brought by Bernard L. Weister for the possession of certain lots of ground in Pittsburg, Pa. Both parties claimed title under William Mowry. Weister, the plaintiff, claimed as purchaser of the alleged wife and daughter of said Mowry; the defendant claimed as the purchaser from Mowry's mother, in whom the title vested, if he died unmarried and without children entitled to take.

Weister, the plaintiff, showed that in 1844 Mowry went to Saginaw Valley, in the state of Michigan and there became acquainted with Mary, the daughter of an Indian named Pedrow. Mowry and Mary became married without any formal ceremony, lived together as man and wife, and had one child born to them named Elizabeth. Mowry died in 1852 without having made a will, and leaving but the one child Elizabeth. Elizabeth conveyed the property in question to the plaintiff. If she was the legal heir of Mowry, she would inherit his property and have the right to convey. Whether a legal marriage existed between Mowry and Mary determined these points.

The defendant claimed that a valid marriage did not exist because the Michigan laws expressly states the manner in which a marriage should be solemnized. Mr. Justice Strong delivered the opinion of the Court:

"At common law an informal marriage by a simple agreement between the parties to be man and wife at the time of the agreement and from then on, entered in good faith, is a valid marriage. This is a common law right. A statute may take away this right, but there is the presumption that the legislature had no such intention unless it is plainly expressed. A statute which requires that a marriage should be entered into in the presence of a magistrate or clergyman or that it be preceded by a license, is merely directory of the manner in which a marriage may be perfected; a statute must expressly state that no marriage shall be valid unless solemnized in the prescribed manner in order to make a common law marriage invalid. The Michigan statute does not expressly state that a common law marriage is invalid. Therefore Mowry and Mary were legally husband and wife. Elizabeth was the legal heir and had the right to convey the property to Weister, the plaintiff."

RULING LAW

Story Case Answer

It has long been a mooted question in the courts of various jurisdictions as to whether an informal marriage is valid; but whatever may be the historical facts, the public generally recognize the necessity of some formal observance of marriage, in order that the parties conserve their respectability in the community. Either celebration before a clergyman or in the presence of such civil officer as the statute may designate is therefore necessary today. This is the law in England and in many of the states. When the state law is not clear in making void a common law marriage without ceremony, public opinion has the effect of forc-

ing the parties to observe the formalities. The case of *Weister vs. Moore* is of importance in stating the view of the United States Court in the question of common law marriages.

The validity of a marriage is always determined by the law of the place where the marriage was entered into at the time it was executed. Therefore, in the Story Case under the law as laid down in the United States Court, a valid marriage existed between Simon and Edna Brown, and she can take her dower interest in the property in Illinois.

On a point like the one involved here, the student should look to the latest statutory law of his state to determine if any change has been enacted at a recent date.

B. Capacity of the Parties

STORY CASE

In early life James Hanna was a man of keen mentality and was successful in accumulating considerable wealth. He married Elizabeth Warner when he was twenty-three years old and during their life together two children were born to them. Seven years after their marriage Elizabeth, the wife, died. James grieved over her death so much that his mind became unbalanced. He went away to another town to live and was not heard of again until after his death. His property and children were taken in hand by his father. After leaving them, and while in an unbalanced condition, he became infatuated with Sarah Hill, and married her. She now claims a dower interest in his property. His children by the first marriage deny that she has any interest on the ground that the second mar-

riage was void since the father had not the legal capacity to enter into a marriage contract. Sarah Hill maintained that a license had been secured and all the marriage formalities had been observed, and therefore, she was now entitled to her interest. What should be done?

RULING COURT CASE

Foster vs. Means, Volume 42 *American Decisions, Page* 332.

Henry Foster was a very weakminded person. He could never learn to read and but imperfectly learned the alphabet, even though when thirty-two years of age, he gave constant attention to it for nine or ten months. He had a very imperfect knowledge of the value of money. He knew a dollar from a quarter piece but had no knowledge of the relative values of the pieces.

At the death of his father he became the owner of a great deal of real and personal property. He married and after his death Polly Foster, his wife and the plaintiff in this action, claimed her marital rights in his personal property. The defendant, however, who was the administrator of the deceased, contended that she had no right whatever in the property because the marriage was void. He based the claim on the fact that Foster had not the mental capacity to marry.

Decision: Because of the mental condition of Henry Foster, he had no capacity whatsoever to enter into such a marriage. Consequently the marriage was void. Since the marriage was void, she was never his wife and therefore never had any interest in the personal property of Henry Foster, deceased.

Accordingly, judgment was given for the defendant.

RULING LAW

Story Case Answer

As in other contracts, so in the marriage contracts, the parties thereto must have capacity to assume the relation with its duties and obligations. This capacity is spoken of as marital capacity.

Incapacity to enter into the contract of marriage may be either mental or it may be legal. Mental incapacity consists in the lack of understanding on the part of one of the parties as to the nature and character of the relation which he is assuming. If such a person is so mentally deficient that he does not realize what he is doing, he is said to have been mentally incapacitated to assume the relation and a marriage of this kind is absolutely void but may be annulled by proper proceeding brought for that purpose.

Legal incapacity, as distinguished from mental or actual incapacity, consists in some restraint put upon marriages by certain persons. In many states whites are forbidden to marry blacks. At common law persons under the age of consent are legally incapacitated to marry. The age of consent at common law is fourteen years.

In the Story Case, Sarah Hill cannot acquire any interest in the property because her marriage with James Hanna was void. It is shown by the facts that James Hanna was mentally incapable of making a marriage contract.

C. Consent of the Parties

STORY CASE

Henry Walton misrepresented to Hilda Edwards the status of his financial worth in order to get her consent

to marry him. He told her that he had property worth ten thousand dollars and could supply all her material wants without trouble. She married him in reliance on this statement. After the marriage she learned that her husband was worth a very small amount—not over one thousand dollars. Thereupon she tried to have the marriage annulled, on the ground that there was no real consent to the marriage since she was induced by fraud to enter into the marriage. Walton defended on the ground that altho the statements were untrue, this was not sufficient fraud to annul the marriage. Is this correct?

RULING COURT CASE

Lorenzo vs. Lorenzo, Volume 174 *New York Reports, Page* 467.

This was an action brought to have the marriage between the plaintiff and defendant annulled, upon the ground that the former's consent thereto was induced by the fraud of the latter.

It was shown that prior to the marriage the plaintiff had had illicit intercourse with the defendant. Soon thereafter the plaintiff left the City of New York where they both lived at the time. Upon his return sometime thereafter, the defendant stated to the plaintiff that while he was gone she had given birth to a child of which he was the father. It appeared that the defendant had a child in her possession, which she exhibited to the plaintiff, of which he was the father, according to her claim.

In view of this state of things as pictured by the defendant, she demanded that the plaintiff marry her immediately. The latter believing that her representations were true, consented to do so.

After the marriage, the plaintiff discovered that all of these representations were false; he found that she not only had not given birth to a child of which he was the father, but that she had not given birth to any child at all. It was shown that the child which she exhibited as his was one which she had procured for the purpose of inducing the marriage.

Mr. Justice Gray, said in part as to the validity of this marriage: "In this case, the representations of the defendant were as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been obtained to the marriage. It was designed to create a state of mind in the plaintiff, the operation of which would be to yield a consent to marry the defendant, in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation. The artifice was such as to deceive a reasonably prudent person."

Accordingly, since there was no real consent to this marriage, it was decreed that it should be annulled at the prayer of the plaintiff.

RULING LAW

Story Case Answer

In a previous topic we discussed the mutual consent requisite in a contract to marry; that is, what consent is necessary in order to render a promise to marry binding? Now we come to a situation where the parties have married and the question is, to what extent will the previous lack of consent render a marriage void or voidable?

When the parties have married, the relation is more than a mere contract relation. It becomes a legal status, a domestic relation. The policy of the law is

to make it as binding as possible. It hesitates to dissolve or declare it void.

Courts will seldom declare a marriage contract void, unless the consent was in no sense real. Fraud of a very serious nature, perpetrated on the other party to the marriage will render the marriage voidable. Concealment of pregnancy, caused by a third party before marriage, is of such a serious nature that it will render the marriage void. So in the case of *Lorenzo vs. Lorenzo,* the court was of the opinion that the fraud there was of such a serious nature that the plaintiff never did give a real consent to the marriage relation.

Almost invariably the law will hold that misrepresentation as to financial worth is not sufficient to invalidate the consent. Such misrepresentation is not sufficient to have the Court declare the marriage void. Therefore, in the Story Case, the parties were legally married.

D. Marriage Formalities Without Complete Consent

STORY CASE

James Harland and Sarah Crane, two actors, were much devoted to their stage work. In 1910 they decided to become husband and wife in name; they agreed at the same time in writing never to completely consummate their marriage, but to give their lives to their profession. Accordingly the two parties secured a marriage license from the county clerk and had their marriage ceremony conducted by a Methodist minister, and were thereafter known as husband and wife.

In January, 1915, James Harland died leaving real estate valued at $10,000. Prior to this time, Harland's

sister, and only heir secured possession of the document containing the unique agreement made between Harland and Miss Crane. The sister contends that because of this agreement a valid marriage was never perfected and that the alleged wife had no dower rights to Harland's land. Is this correct?

RULING COURT CASE

Cornelia Allen Forrest vs. J. Dorsey Forrest, Indiana Reports (Not yet Officially Reported. Decided in November, 1914).

Miss Cornelia Allen and J. Dorsey Forrest were married in the office of a justice of the peace in Akron, Ohio, on September 23, 1911. Mr. Forrest had been married to Miss Allen's sister. She had died, leaving Forrest living with Miss Allen and her mother. The mother died two days later and to escape criticisms for living in the same house Forrest and Miss Allen married as stated above, but with the understanding that the marriage should never be consummated. Subsequently Mrs. Allen-Forrest became head of the department of English at Butler University in Indianapolis, Indiana, and Mr. Forrest also became engaged in a new occupation. This action was brought to declare the marriage void and of no effect because of the agreement of the parties.

Judge Charles Reinster rendered the decision: Tho these parties have occupied the same house together they have never lived as husband and wife since they have expressly agreed never to consummate their alleged marriage in its entirety. The marriage is therefore void from the beginning and of no effect.

RULING LAW

Story Case Answer

Marriage formalities and marriage ceremony alone will never complete a marriage. There must be the consent and agreement of both parties to live together as husband and wife. Therefore mock marriage ceremonies conducted for reasons of sport are of no effect no matter how official or formal they may be. In the Story Case, a complete marriage was not consummated and the sister as only heir has title to all of her brother's land.

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3. Effect of Marriage on Property of the Woman

A. Personal Property

STORY CASE

John Sampson became the husband of Helen Gould. At the time of their marriage one Rowen owed to Helen Gould the sum of two thousand dollars. Two years after the marriage, the wife died and this money had never been collected. The parties lived in a state which had never, by statute, changed the old common law rule that the wife's personal property goes to the husband when they are married. Sampson maintained that he had the right to collect this entire account against the deceased wife's other claimants. Is he correct?

RULING COURT CASE

Erringdale vs. Riggs, Volume 148 *Illinois Reports, Page* 403.

A man and woman married in Kentucky in 1827. At the time of the marriage she had considerable money, possession of which was taken by the husband after

marriage. They moved to the state of Illinois in 1834, where he purchased property with the money in question, taking title thereto in his own name. In this action, it was contended by the wife that since her money was used in purchasing the same, she was entitled to an interest therein.

Mr. Justice Phillips said in the opinion of the Court: "It was a rule of the common law that chattels personal or money in possession of the wife at the time of her marriage at once became the property of the husband. This also made after acquired personal estate coming to and in possession of the wife the property of the husband, unless settled upon her as her equitable separate estate. The claim in this case, that the land in controversy was purchased with money belonging to the wife, cannot be sustained, as the husband and wife married in 1827 and came to this state in 1834. Any money or personal property belonging to the wife and in possession at or from the time of her marriage to the time of the purchase, having become the property of the husband under the rule of the common law, when he purchased the land and took title to himself, he took it free from any resulting trust in favor of the wife and the title thereto vested in him absolutely."

Accordingly it was held that the wife had no interest whatsoever in this property by virtue of the fact that money, formerly belonging to her, had been used as the purchase money.

RULING LAW

Story Case Answer

The common law judges were very fond of the fiction that man and woman became one when they married.

They said that the identity of the woman merged into that of the husband. Accordingly, it was held that the husband became entitled to all the personal property which belonged to the wife when they married. Such personal property as domestic animals, furniture, and money became absolutely the property of the husband immediately upon marriage. Debts which were owed to the wife, or claims against third persons, commonly called "choses-in-action" did not become absolutely the property of the husband upon marriage; but he was given a conditional right to them. If he collected them during the continuance of the marriage relation they belonged to him absolutely. Otherwise they survived to the wife.

In the Story Case, Sampson had the right to collect the account owing to the wife only so long as they were married. If she died, or if they had been divorced, this right in the husband would cease. At her death the right would go to her proper heirs. The husband's rights in this particular case may be those of an heir. A divorce would, similarly, revert the right to the wife.

The old common law has been changed by statutes in many states by which it is provided that all the personal property of the wife shall continue to be hers after the marriage.

B. Real Property

STORY CASE

William Harnett and Edna Davis were married and lived in a state which had not changed the old common law of England, that the husband acquired by marriage an interest for life in the lands of his wife. Edna

Davis owned one hundred acres of land when she became the wife of Harnett. Two years after their marriage, against the protest of his wife, Harnett sold this land to Omer Balon and Balon took possession of the land. The wife thereupon brought suit to have Balon ejected on the ground that altho the husband had a life interest he could not sell the land and give possession to another. Is this correct?

RULING COURT CASE

Harris vs. The Junction Railroad Company, Volume 9 *Indiana Reports, Page* 184; *Volume* 68 *American Decisions, Page* 618.

In February, 1853, a tract of land was conveyed to Ellen, the wife of Jesse Harris. In October of the same year, Jesse and Ellen, by a deed with full covenants of warranty as to title, conveyed the land to the Junction Railroad Company, and received payment for the same.

At the time this conveyance was made, Ellen was between nineteen and twenty years of age. This suit is now brought by Jesse and Ellen to recover the land on the ground that Ellen was a minor when the land was conveyed.

Decision: Upon the marriage of man and woman, the husband acquires an interest in her property for their joint lives. In other words, he gets a life estate for their joint lives. The conveyance in this case passed his interest therein, that is, it passed his life estate. This they cannot recover for the minority of the wife did not affect the husband's life interest. The wife, however, has the reversion, or the remaining part of the estate, after the husband's life estate terminates, and she may recover that from the defendant.

Accordingly, it was held that the land could not now be recovered.

RULING LAW

Story Case Answer

We have just seen that the husband became by marriage the absolute owner of all personal property which belonged to his wife and all choses-in-action which he collected during the continuance of the marriage relation. The courts did not, however, apply this doctrine to the same extent in reference to the wife's real property. Real property, owned by the wife at the time of her marriage, continued to be hers; but during their joint lives the husband was entitled to all rents, profits and income accruing from the land.

In the Story Case, since the state legislature had not changed the common law brought to this country from England by the first settlers, this common law is applicable. Harnett, therefore, acquired a life interest, that is, the right to the land during his life. This interest he could convey. He could, moreover, give possession to the purchaser for his, the husband's, life. Consequently the wife must lose in the ejectment suit.

Statutes in all states have now given married women the right to hold their property free from the claims of their husbands. These statutes generally apply to both real and personal property.

C. Wife's Separate Estate

STORY CASE

Helen Warner, the wife of Henry Warner, received an estate by will from her father. When making the will the father expressly devised that this land, given

to the daughter, should be her separate estate, free of the claims of her husband. Two years after acquiring the land, Helen Warner sold it, and with the proceeds purchased another plot of land. The parties lived in Indiana and this sale and purchase, made by the wife, was effected before the state legislature passed a law changing the old common law rule as to the rights of the husband in the wife's land. Therefore, Henry Warner claimed a life interest in the land purchased by the wife, and proceeded to sell this interest. She objected on the ground that this land was purchased with the proceeds derived from her father's estate. Is this a good objection?

RULING COURT CASE

Kirkpatrick vs. Buford, Volume 21 *Arkansas Reports, Page* 268; *Volume* 76 *American Decisions, Page* 363.

It appears that Elijah Kirkpatrick, by an antenuptial settlement made in the state of Georgia, transferred certain household furniture to his wife, Ann, as her sole and separate estate, free from his control and exempt from his debts and liabilities. She continued to hold the furniture as her own separate property until she and her husband were about to move to Arkansas, when she sold it. After arriving in Arkansas she purchased land with the proceeds of the furniture sale and took title to the land in her own name. This land was levied upon by Buford to satisfy a judgment which had been recovered against the husband Elijah. A bill was thereupon brought, on behalf of Ann Kirkpatrick, to restrain the sale of her property.

Decision: Proceeds arising from the sale of the wife's sole and separate property are to be regarded

as her separate estate. So are lands purchased with such proceeds and they are subject to the same rules as was the original estate before it was sold and converted into a different specie of property. It was decreed that the sale of her property should be restrained.

RULING LAW

Story Case Answer

At common law the husband, upon marriage, became the owner of all chattels personal, and was given the right to collect all choses-in-action belonging to his wife at the time of the marriage. He was also entitled to all the rents, profits and income from her real estate during their joint lives.

Courts of equity felt the injustice of such rules and consequently created a wife's separate estate in equity, which was free from the debts of her husband, and over which he had no control. This was done by the courts so ruling and without the aid of statutes. The separate estate might consist of personalty or realty, given to or purchased by the wife, prior to or during the marriage.

In order to establish the wife's separate title to such, a clearly expressed intention had to be shown that the property so given or settled upon her was to be her sole and separate estate, and that it was to be forever free from the claims of the husband.

In the Story Case, although the statute protecting the wife's separate estate had not been passed, nevertheless the Court would protect her in her possession, because it was purchased with the proceeds of land given to her by her father, with the express restriction that it should be free of her husband's claims.

In modern times statutes have been passed which create statutory separate estates for married women. The manner of creation of such statutory separate estates depends upon the statutes in the various states. When a statute decrees that a woman's property shall remain her property, this statute is enforcible in all the courts.

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4. Contracts Made by the Wife

A. Contracts Made Before Marriage

STORY CASE

Doris Miller and Richard Robins were married in 1910. Before their marriage Richard asked her if she owed any obligation of any kind, and she answered in the negative. She did, however, owe $200 on an account with a local retail store, which she hoped to pay secretly after the marriage. A year after the marriage Doris died, and the account had never been paid. The department store then attempted to hold Robins liable for the account on the ground that the husband assumes the liabilities of his wife when they become married. Robins defended on the ground that he was ignorant of this claim at the time of marriage, and that, in any case, he would not be liable after the death of his wife. Is this a good defense?

RULING COURT CASE

Cole vs. Shurtleff, Volume 41 *Vermont Reports, Page* 311; *Volume* 98 *American Decisions, Page* 587.

The defendant married a daughter of the plaintiff. Sometime prior to the marriage the daughter bought clothing which her father paid for and which she agreed to repay him for later. After the death of the

daughter the plaintiff demanded that the defendant pay for the goods which the daughter had purchased. The defendant refused to do so, and this action was brought to recover for the same.

Decision: "As to this antenuptial debt of the wife, the plaintiff, as a legal consequence of his marriage, became liable to pay it; but this was a joint liability with the wife. She could not have been sued alone, neither could the husband. It is an elementary rule that when a *feme sole,* who has contracted debt, marries, the husband and wife must, in general, be jointly sued in an action to recover thereon, even though the husband has expressly promised to pay it.

"This liability of the husband, arising and existing as a consequence of the marriage and which can be enforced only in a joint action against both, is of a temporary or qualified nature. It terminates on the death of the wife unless enforced during coverture by the recovery of a judgment against the husband."

It was therefore held that the plaintiff could recover nothing in this action.

RULING LAW

Story Case Answer

Upon the marriage of a man and woman, the man becomes obligated to pay all the debts which the wife owed previous to the marriage. This is sometimes said to be based upon the fiction that husband and wife are one. By some courts it is said to be based upon the fact that the husband acquires all the personal property of the wife upon their marriage. It seems, however, that the husband is liable for his wife's debts, whether or not he knows of their existence when he marries the woman, and whether or not he re-

ceives from her any personal property, with which to pay her debts. It is to be noted, however, that this is not an absolute liability on the husband. It becomes a joint liability of husband and wife and unless judgment is procured against the husband during their joint lives, neither he nor his estate is liable for the debt.

In the Story Case, Robins is not liable to pay the department store account. His first defense is not good because the husband's ignorance of the claim is immaterial, but his second defense is good. He is not liable alone, but only jointly with his wife.

The rule of law stated here is not changed by statutes giving a married woman her separate estates. A statute giving her these rights does not, in itself, free the husband of her obligation. To accomplish the latter requires explicit statutory enactment.

B. Contract Made After Marriage

STORY CASE

Andrew Cloud and his wife lived in Massachusetts before that state changed the common law rule that a woman could not contract in her own name after marriage. Two years after they were married a conflict arose between them and Cloud refused to continue living with his wife. After he had moved into another house and left her at their original home, she made a contract to purchase a piano from the Werner Piano Company. Later she refused to take the piano, and the company brought suit against both the husband and wife. He defended on the ground that she did not

have the right to contract any liability in his name, and she defended on the ground that, as a married woman, she had not the power to bind herself alone. What do you say as to the defenses?

RULING COURT CASE

Shaw vs. Thomson, Volume 16 *Pickering's Massachusetts Reports, Page* 198; *Volume* 26 *American Reports, Page* 655.

This was an action for services rendered and necessaries furnished to Thomson's deceased wife. When these necessaries were furnished the wife, her husband was a pauper in the almshouse, and the wife was living with the plaintiff, who was her daughter. The question raised was whether the wife could bind herself for support while her husband was still living.

Mr. Chief Justice Shaw delivered the opinion of the Court: "By law, a husband is entitled to all the personal property of the wife, including choses-in-action, to all her earnings and acquisitions and to the income of her real estate. It also throws upon him the obligation to support and maintain her. Any implied promise, therefore, which the law raises to one who affords such support and maintenance, is the promise of the husband and not the wife. Nor is a married woman liable on her express promise for support. This rule necessarily follows from the principle that the husband and wife are one person in law and her ability to bind herself by express contracts is necessarily suspended."

The Court decided that the plaintiff could recover of the defendant.

RULING LAW

Story Case Answer

At common law the wife was without power to bind herself on contract. She could not bind herself even for the absolute necessaries of life. Any necessaries which she procured, were chargeable to her husband but not to her. In the Story Case, the husband is not liable to the piano company because the article purchased is not a necessity and the wife has no power to bind her husband on any contract. The wife is not liable because at common law she could not bind herself in a legal obligation.

After the courts of equity had given to a married woman the power to own a separate estate free from the control of her husband, she might bind herself by a contract made in connection with, and for the benefit of, her separate estate. Modern statutes have greatly removed the common law restrictions upon the capacity of married women to contract. With few exceptions they may now contract as freely as single women.

C. Liability of Husband for Wife's Necessaries

STORY CASE

Jesse Davis and his wife were not living together. Davis was at fault, not only refusing to live with her, but also refusing to support her in any way. When winter was approaching she wanted to make sure that she would be properly provided for, and therefore made a contract with a grocer for the latter to furnish her all the food she would need, until the following spring. She made the contract in her husband's name, and agreed to pay a certain sum per month for all the

supplies furnished. After the contract was made the grocer demanded payment under it from Davis. The latter refused to pay, saying she had no authority to make the contract, and also that it was an unreasonable contract. Has he a good defense?

RULING COURT CASE

Bergh vs. Warner, Volume 47 *Minnesota Reports, Page* 250; *Volume* 28 *American State Reports, Page* 362.

This was an action against Warner for debts contracted by his wife during their marriage. The first claim was for the price of a pair of diamond ear-rings. The second was for a small sum expended for the repair of certain articles of jewelry.

Mr. Justice Mitchell said in part: "The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent and as such bind him. This agency is frequently spoken of as being of two kinds: (1) That which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish. (2) That which arises from the authority of the husband, expressly or impliedly conferred as in other cases.

"The first of these, sometimes called 'agency by law' or 'agency of necessity', is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would under such circumstances be liable, although the necessaries were furnished against his express orders. The real founda-

tion of the husband's liability in such cases is the clear legal duty of every husband to support his wife and supply her with means suitable to her situation and his circumstances and condition in life."

Before the plaintiff can recover in such a case, he must show that the articles furnished were necessaries. He must show that the wife was in need of such necessaries and that the husband had failed or refused to furnish her with the same. Since it was not shown in this case that the husband had neglected or failed to furnish the wife with the reasonable necessaries of life it was held that the plaintiff could not recover.

RULING LAW

Story Case Answer

The wife has no legal capacity whatsoever to bind herself to contracts while she is married, except as the common law has been modified by rules of courts of equity or by modern statutes. Furthermore, the marriage contract gives her no right to bind her husband on general contracts. She may bind her husband to some extent as an agent, appointed by her husband, and by him given power to contract. In such cases no difficulty arises. The rights and liabilities of the husband are governed by the same principles which govern the relation between any principal and agent. She is also an agent by law, or an agent of necessity, for the purpose of supplying herself with the necessaries of life when her husband refuses or neglects to furnish her therewith. This is not strictly a part of the law of agency. The obligation of the husband in such a case does not depend upon the principles of agency. He is liable even though he may have expressly denied to the public that she was his agent. This obligation

arises from the fact that he is under a duty by virtue of the marriage contract, to support his wife in a manner consistent with his means and station in life. If he fails or neglects to so do, third persons may furnish the wife with necessaries and hold him liable therefor. Persons furnishing a woman with necessaries should be careful to see that the husband has failed or refused to support his wife in a proper manner and to take care that the things furnished are reasonably necessary for the wellbeing and comfort of the wife. What constitutes necessaries is a question to be determined in the light of each case. In general it may be said that she is entitled to have food, clothing, and shelter of a character and kind usually enjoyed by others of the same rank and station in life.

In the Story Case, the husband is not liable on the contract made by his wife. He is liable merely for the reasonable value of the necessities actually furnished to her, and the contract price is immaterial. Neither is he liable for necessities to be delivered in the future.

D. Later Developments in Courts of Equity

STORY CASE

Frank Shepherd and his wife, Laura, lived in the state of New York before that state made any change by statute with reference to the ability of married women to contract. The wife, Laura, owned a strip of land which was given to her by her father as her own separate estate to be free of the claims or debts of her husband. Two years after the parties had married, the husband and wife together made a contract to build a house upon the land. The contract was made with

Howard Davis. After this contract was made Shepherd and his wife refused to comply with it. Shepherd himself was not financially responsible and therefore in a suit against both of them, Davis tried to make the land accountable for his loss because of the breach of contract. The wife put in defense the inability of a married woman to make a contract. Davis answered that a married woman could make a contract with reference to her own separate estate. Is this correct?

RULING COURT CASE

Yale vs. Dederer, Volume 22 *New York Reports, Page* 450; *Volume* 78 *American Decisions, Page* 216.

The defendant's husband wished to purchase a cow from the plaintiff on credit. The plaintiff was unwilling to make the sale unless the husband procured the signature of his wife to the note which he was giving as payment. The wife consented, saying at the time that if her husband was not able to pay it, she was. This action was brought by the plaintiff upon the note, seeking to obtain satisfaction from the separate estate of the wife. The trial judge found that the defendant "intended to charge and expressly charged her separate estate for the payment of the note." He gave as his judgment that enough of her estate be sold to satisfy the demand of the plaintiff. Defendant appealed to this judgment.

Decision: A married woman can bind her separate estate, provided, that there is a clear intention to do so, and that the contract is connected with, or made for the benefit of, such separate estate. In this case there was a clear and unequivocal intention to bind her separate estate; but it did not appear that there was any connection between the subject matter of the sale and

her separate estate. In other words, it did not appear that the purchase of the animal would benefit, in any wise, her separate property. Judgment was given for the defendant.

RULING LAW

Story Case Answer

A married woman cannot assume any contractual obligation at common law; she could not even contract for necessaries of life. She was so far merged into the identity of her husband that she scarcely had any legal recognition. When the courts of equity created her separate estate, obviously this estate would do her little good, unless she likewise was given the right and power to make some contracts. The courts then permitted her to make contracts in regard to, and for the benefit of, her separate estate; such a contract created no personal obligation upon her, but only bound her estate.

In the Story Case, Davis could hold the wife accountable on the building contract because it was made to bind her separate estate and to benefit her own separate estate. These difficulties are practically obviated today, because the state legislatures have enacted laws giving married women the right to make contracts. The question may be of importance, however, in fixing rights that came into existence before modern statutes on this point were enacted.

E. Liability Under Modern Statutes

STORY CASE

Mrs. Robert Rockwell, a married woman, living in Arkansas and owning property there, agreed in 1914

to become surety on a note for John Farwell. The note was executed by Farwell for five hundred dollars in favor of Henry Cullet, and Mrs. Rockwell agreed to pay it providing Farwell failed. The latter did not pay and Cullet brought suit against Mrs. Rockwell. Mrs. Rockwell's defense was the old common law inability of a married woman to make a contract. Cullet replied that the statute of Arkansas gave a married woman the right to contract and bind herself. Which party is correct?

RULING COURT CASE

Sidway vs. Nichol, Volume 62 *Arkansas Reports, Page* 146; *Volume* 34 *Southwestern Reporter, Page* 529.

The plaintiff, Sidway, made a loan to Mrs. Nannie Nichols, for the repayment of which Mrs. Nichols and her husband gave a promissory note to the plaintiff. After the death of both, the plaintiff began this action upon the note against the personal representative of Mrs. Nichols. They are liable providing she was liable when living. Prior to the time when she gave this note a statute was enacted in Arkansas which provided that property owned by a married woman at her marriage, or afterwards acquired, should be her separate property. It was further provided that she might bind herself upon contracts in respect to her separate estate.

Decision: This note was binding upon Mrs. Nichols; the effect of the statute, referred to in the statement of facts, was to permit her to borrow money, rendering such an obligation a contract in respect to her separate estate, even though by the act she was acquiring separate estate.

Mr. Justice Riddick said in part: "Such a contract before the enabling act was passed created no personal liability against her, for the reason that the separate property of married women, before the passage of such laws, was altogether a creation of the court of equity. By the common law she could make no contract; the contracts of a married woman were void at law. Inasmuch as her creditors had no means, at law, of compelling the payment of her debts, the courts of equity, which had created her separate estate, took upon themselves to enforce her promises, not as personal liabilities, but by laying hold of her separate property as the only means by which they could be satisfied.

"While the law stood in this condition, our constitution was adopted, and statutes were enacted providing that property owned by a married woman at the time of her marriage, or acquired afterwards, should be and remain her sole and separate property, providing that that bargain or contract made by her in respect to her sole and separate property, business or service, shall not be binding on her husband or render him or his property in any way liable therefor, but she may sue alone or be sued alone in the courts of law on account of said separate property, business or services.

"Our conclusion is that a married woman has under our law the right to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed became her separate property. Her contract to pay for the same is a contract in reference to her separate property and creates a personal obligation, valid in law and in equity, and without regard to whether she owned any additional property or not."

RULING LAW

Story Case Answer

When statutory separate estates were created for married women, it likewise became necessary to permit her to make contracts in order that she might derive some benefit from such estates. Just what contracts she can make, and whether she binds herself or her separate estate, depend entirely upon the statutes creating the estate. These statutes, in general, provide that married women may own property, real and personal, free from the claims against the husband and free from his control. They also provide that she may make contracts, sue and be sued, in reference to her own estate. These statutes, like the one in Arkansas, do not generally give a married woman the right to contract beyond matters pertaining to her own property. She is still under the old common law disability when her acts pertain to other matters. In the Story Case, Mrs. Rockwell is not bound on her contract with Cullet because the agreement does not pertain to her own property. Her defense is good.

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5. Civil Wrongs Committed by the Wife

A. Before Marriage

STORY CASE

Miss Anna Waldo, the owner of considerable real estate, became involved in a boundary line dispute with Edward Hilton. Miss Waldo became angry and instructed the servants to trespass and commit injury to the property of Hilton. Before Hilton collected any damage for the losses suffered, Miss Waldo married John Simpson. Thereupon Hilton brought suit against

both Mr. and Mrs. Simpson to recover for the losses. Simpson replied that he was not liable since the state statute had given the married woman power over her own property, and the right to retain this property; that this abolished the common law, since there was not any reason for holding the husband. Hilton answered that this particular feature of the common law holding the husband for the wife's pre-marriage liabilities was not expressly abolished, and therefore it was still in force. Who is correct?

RULING COURT CASE

Culmer vs. Wilson, Volume 13 *Utah Reports, Page* 129; *Volume* 57 *American State Reports, Page* 713.

The circumstances leading up to this case were as follows: Culmer, as agent for Mrs. Belle Tompkins (later Mrs. Wilson) had, at her request, brought an action of forcible entry and detainer before a United States Commissioner against Anna Marks. This commissioner rendered judgment in favor of Culmer and Mrs. Tompkins. In pursuance of this judgment Mrs. Tompkins went into possession of the land previously occupied by Anna Marks. Anna Marks then sued Culmer, Mr. and Mrs. Tompkins jointly for trespass on her property on the ground that the United States Commissioner, by whose judgment she had been deprived of her property, did not have jurisdiction. Judgment in this second case was rendered in favor of Anna Marks. Culmer and Mrs. Tompkins, being joint wrong-doers, owed the damages to Anna Marks jointly. Culmer, however, paid the damages in full. By this time Mrs. Tompkins had been divorced by her husband and had married R. C. Wilson. This action was brought by Culmer against Mr. and Mrs. Wilson

to recover contribution towards damages paid by him as joint wrong-doer with Mrs. Wilson.

It was contended by R. C. Wilson, one of the defendants, that he was not liable because the statutes which gave to the woman control over her property also gave her the power to contract, to sue and be sued and that it relieved him of his liability for her contract and civil wrongs.

Decision: At common law, the husband had almost absolute control over the person of his wife, as well as her property, and he became the arbiter of her fortune. She was in a condition of complete dependence; she could not contract in her own name, was bound to obey him, and her legal existence was merged into that of her husband. They were termed and considered one at law. As a consequence he was made liable for her debts contracted before her marriage and for her civil wrongs as well. After modern legislation on the subject, which gives the wife control over her own property, the power to sue and be sued and to contract, this liability on the part of the husband for her wrongs committed before marriage no longer exists.

Therefore the husband was not liable for this tort committed by his wife before her marriage to him.

RULING LAW

Story Case Answer

At common law a husband was liable for the civil wrongs committed by the wife before marriage, provided judgment was recovered on them during their joint lives. Modern legislation, which gives to the wife separate property rights, the right to contract, the right to sue and be sued, holds that the husband is no longer liable for wrongs committed by her before mar-

riage, since the reason for this rule is not in existence. Some courts abolish this liability of the common law by implication. Other courts hold that unless it is expressly abolished by the statute, this old common law is still in existence, and the husband is liable for pre-nuptial obligations, although the wife retains her property. Some states have by statute abolished the rule that a husband is liable for the wife's pre-nuptial debts, and in these states the decision is certain. Changes are constantly being made in the statutes of the various states and the reader must look to the most recent legislation of his own state to decide a particular case.

B. Liability for Wrongs Committed After Marriage

STORY CASE

Mrs. Mary Story, the wife of Amos Story, carelessly drove her horses and wagon into a vehicle belonging to John Moore, doing damage to the vehicle and also injuring Moore. Mr. Story was not with his wife at the time of the collision. Mrs. Story refused to pay anything for the losses suffered by Moore and the latter brought suit against her to recover damages. Mrs. Story's defense was that Moore could not sue her alone, but must bring his action jointly against herself and husband. Moore relied upon a statute, which provided that the husband need not be joined in an action when the wrong was committed independently by the wife. Was the suit properly started?

RULING COURT CASE

Leipf vs. Strause, Volume 101 *Alabama Reports, Page* 433; *Volume* 46 *American State Reports, Page*

122; *Volume* 23 *Lawyers' Reports, Annotated, Page* 622.

The defendant brought this action for injuries sustained by the plaintiff from a vicious dog kept by the defendant and which was known to be vicious and yet allowed to run at large. In defense the defendant contended that she was a married woman, that her husband was still living, and that she was living with him at that time, and that he was liable for the wrong; and, if not liable, at least should have been joined in the action. The plaintiff relied upon a statute which provided that the husband need not be joined in any action against his wife for civil wrongs, unless he participated in the wrong.

Mr. Chief Justice Stone said: "Under the common law, if the tort was committed in the presence of her husband, prima facie, it was not her tort, but was presumed to have been the work of her husband's coercion. For such act, unless it was affirmatively shown that she acted independently of her husband's will, she could not be sued, even co-jointly with her husband. It was his tort, and his alone, and he alone was suable for it. If she committed a tort in the absence of her husband, or if present, if it was affirmatively shown that she acted of her own will and independently of his, then she could be sued, but the suit could only be maintained against her and her husband jointly.

"In this last class of cases the statutes have been changed to such an extent that it is neither proper nor permissible to join the husband as a defendant in an action for a tort committed by his wife, 'in the commission of which the husband does not participate'. In cases involving a tort by the wife in which at common

law the husband and wife should be jointly sued, the wife, under the statute, may and must be sued alone."

Accordingly it was held that the wife might be sued alone since it was not shown that the husband joined in the commission of this tort.

RULING LAW

Story Case Answer

At common law a married woman who committed a civil wrong or tort at the request or direction of the husband, made the husband alone responsible and he had to be sued alone therefor. If the wrong was committed in his presence, it was presumed to have been done at his request and under his direction; and unless he could show that she acted of her own free will and accord he alone was liable therefor, and the wife could not be joined. If, however, the wife committed a wrong in his absence, or if she committed a wrong in his presence, and he could show that she acted independently, it was their joint wrong, and they had to be sued jointly. He would be responsible for the judgment when entered against them.

In modern statutes many changes have been made in this regard. In cases where husband and wife both participate in the commission of the wrong, both are jointly liable as at common law. But where the wrong was committed by the wife acting independently of her husband, it is generally provided that the wife, and the wife alone, may be sued in respect thereto. In the Story Case, the statute given by the plaintiff, Moore, is applicable, although the wife was doing an errand for her husband. The wrong committed was done independently of the husband. He could be sued separately as a principal since his wife was acting as his agent. This point is taken up in the law of agency.

6. Civil Wrongs Suffered by Wife or Husband

A. Right of Wife

STORY CASE

While Mrs. Doris Brown was crossing a street in her town she was run into and seriously injured by an automobile belonging to and being driven by Howard Barr. The accident occured because Barr was carelessly chatting with people in the rear seat of his machine and was not watching the traffic. When Mrs. Brown brought suit against Barr to recover damages, his defense was the fact that a married woman could not start an action alone at common law, but must have her husband join with her. Mrs. Brown answered that the suit was brought to recover for her suffering and pain and not for losses suffered by the husband. Can she recover?

RULING COURT CASE

Dora Bouereis vs. John Wolf, Volume 8 *Lawyers' Reports, Annotated, Page* 680.

The plaintiff in this case was a married woman. During the time of her marriage, and while still living with her husband, the defendant assaulted her, and was guilty of an outrageous, forcible attempt to have carnal connection with her. This action was brought for the damages she suffered as a result of the assault. The action was originally begun in the joint names of the husband and wife. At the request of the wife, the Court allowed the action to be carried on in the name of the wife alone, and the name of the husband was stricken from the records of the case. When this was done the defendant asked that the case be discontinued altogether, because the husband should have remained in the case.

Decision: The injury in this case was primarily the injury of the wife. It was not claimed, as a part of the damages, that the husband lost her services or her society, but the claim was the physical pain, mental anguish and disgrace which the wife suffered. The woman was therefore said to be the meritorious cause of action. But even though this be true, she is not permitted to sue alone. The husband must sue with her in such an action.

It was held that the action could not be maintained in the name of the wife alone.

RULING LAW

Story Case Answer

When, through negligence or wrongful conduct of a third person, an injury is caused to a married woman, two rights of action arise. In the first place the husband has a right of action. This arises from the fact that the injury has caused him the loss of the services and society of his wife, to which, by law, he is entitled. In the same action he may recover any money which he has expended in the care and cure of his wife. For this character of damages the husband generally sues alone. By the same injury, of course, the wife suffers certain physical and mental pain; this injury is primarily her own. She is said to be the meritorious cause of action. Here, however, although she is the one primarily injured, she may not sue alone, but the husband must be joined with her.

Under modern statutes, the husband is still permitted to sue for the damages arising under the first cause of action above referred to. But the wife is not permitted to sue alone for her injury, mentioned above in the second cause of action. The Court Case of *Dora*

Bouereis vs. John Wolf was decided under the old common law. The answer to the Story Case depends upon whether the parties live in a state where the legislature has changed this common law compelling the wife to have the husband join in all her actions.

B. Right of Husband

STORY CASE

Mrs. Helen Johnston, the wife of Henry Johnston, was seriously injured in a railway collision, caused by the carelessness of employees of the Eastern Island Railroad Company. Mrs. Johnston was in a hospital for three months and her husband was put to great expense and loss because of her injury. In an action brought by the husband and wife against the company, two thousand dollars was recovered for her personal injuries. Following this, Henry Johnston brought an action in his own name to recover the money expense he had incurred because of the accident, and also to recover because of his wife's society. The railroad company put in defense the fact that a judgment and recovery had already been secured for this injury. Johnston answered that this first recovery was for his wife, and now he was bringing an action to recover his own losses. Should the action be sustained?

RULING COURT CASE No. 1

Smith vs. The City of St. Joseph, Volume 55 *Missouri Reports, Page* 456; *Volume* 17 *American Reports, Page* 660.

This wa an action brought by the plaintiff to recover damages for the loss of the services of his wife,

and necessary expenses for medicine, doctor's bills and nurse hire in caring for her during an injury which she sustained in consequence of the negligence of the defendant. The charge was that the injury to the plaintiff's wife was the result of falling down an embankment in one of the streets of the city of St. Joseph, which was negligently left in an open and dangerous condition.

The main defense interposed by the defendant was that Mr. and Mrs. Smith had recovered in a previous action on the same accident, and that such judgment was a bar to this action. In the former case the proceeding was in favor of the wife as the meritorious cause of action; that is, the recovery was for her personal injuries, in which the husband joined.

Decision: At common law the rule was well settled that for an injury to the person of a wife during coverture by battery, or to her character by slander, or any such injury, the wife must join with her husband in the suit. When, however, the injury is such that the husband receives a separate loss or damage, as when, in consequence of the battery, he has been deprived of her society, or has been put to expense, he may bring a separate action in his own name.

It was held that the recovery in the former action for the wife's personal injury was no bar to the husband's recovery of what he had lost or suffered as a consequence thereof.

RULING COURT CASE No. 2

Lewis vs. City of Atlanta, Volume 77 *Georgia Reports, Page* 756; *Volume* 4 *American State Reports, Page* 108.

This action was brought by the plaintiff against the city of Atlanta, for personal injuries by the plaintiff sustained in consequence of obstruction in the streets of the defendant city, caused by private parties, who had accumulated materials during the night without the accustomed signal to warn foot passengers of the danger therefrom. The plaintiff claimed, as his damages sustained, the expenses incurred for medical attention and nursing.

The defendant contended that the action could not be maintained because the plaintiff was a married woman and had not joined her husband in this action.

Decision: In the absence of statutory charges, the husband should have been joined in this action. For the injuries to the woman she sues in her own right, but the husband must be joined. For the expenses incurred in curing and caring for her, the husband sues, if he paid them.

RULING LAW

Story Case Answer

An injury to a married woman, at common law, gave rise to two causes of action. One primarily belonging to the husband; and one primarily belonging to the wife. When the injury was one primarily suffered by the wife, both must sue. This was because a married woman was said to have no standing in a Court of Law. But if the husband suffers a separate loss or injury, as for the loss of her services and society, or has incurred expenses in securing medical attention in the care of his wife, he may sue separately in his own name for such an injury; and the fact that he has previously brought and recovered in his own action is no reason why he may not thereafter join with the wife

and recover for the injuries which he has sustained by virtue of relationship with his wife. And vice versa, the fact that a judgment had been secured by both husband and wife for her personal suffering, does not bar a recovery by the husband for expenses he has incurred, and for his own personal losses, in being deprived of the society of his wife. Johnston, of the Story Case, can recover in his action.

C. Right of the Wife When Wrong Is Committed by Husband

STORY CASE

Mrs. Jane Gibson, the former wife of Richard Gibson, secured a divorce from him on the ground of cruel and unjust treatment. The evidence in the trial of the case showed that Gibson had inflicted punishment upon his wife by the use of instruments that resulted in severe pain and ill health. Following the divorce she now brings action against Gibson for damages to recover for her injury. He answers that a wife, or divorced wife, cannot sue her husband, or divorced husband, for damages to recover for injuries sustained. Is this correct?

RULING COURT CASE

Abbott vs. Abbott, Volume 24 *American Reports, Page* 27; *Volume* 67 *Maine Reports, Page* 304.

This was an action by Cynthia Abbott against Ransom Abbott to recover damages for an assault alleged to have been committed by the latter upon the former. The plaintiff and defendant were formerly husband and wife. But before the bringing of this suit they had

been divorced. The wrong of which the plaintiff complains and for which she claims damages was that, during marriage, her husband, without reason or justification, forcibly carried her to an insane asylum and caused her to be detained there for a long time.

Decision: The wife has no civil remedy against her husband for injuries inflicted upon her by him during coverture. The reason is said to be that the husband and wife are one during marriage. Consequently, in the nature of things, no civil wrong can be committed.

The real reason is that it would be against public policy to permit such an action. Every divorce could be followed by an action for damages. Instead of settling marital difficulties, a divorce would tend to aggravate them. With divorces as common as they are, there would be a harvest of litigation following the claim of the plaintiff if it were sustained.

It was held that the plaintiff could not recover in this action.

RULING LAW

Story Case Answer

Whatever other remedies a wife may have against a cruel and unjust husband, she may not sue him for civil damages. He may be punished criminally for cruel treatment of his wife; or his conduct may constitute a cause for divorce at the request of the wife; but she cannot sue him for damages. The reason for this rule, which seems rather unjust, is that the right to such an action would create more trouble than it would do good. The policy of the law, when husband and wife have been divorced, is to close the matter up at once. If damages could be sued for thereafter, every divorce suit would be followed by a damage suit, and the do-

mestic troubles would again be made public in another Court. In the Story Case, therefore, Mrs. Gibson's action will be dismissed from the Court.

D. Right of the Husband for Wrongs Committed With Respect to His Marital Relations

STORY CASE

Truman Oldfield and his wife were both seriously injured in a railroad wreck, while riding on a railroad train of the Lake Western Company. The injuries were sustained in a collision caused by the negligence of the company's employees. Oldfield was confined to a hospital for two weeks, and his wife was there for four weeks. Oldfield first brought an action for his own personal injury and losses therefrom, recovering a judgment of one thousand dollars. Then he brought suit with his wife to recover the losses personal to herself and recovered three thousand dollars; this including her medical expenses. Following this he brought suit to recover his own losses due to loss of his wife's society and the personal expense he was put to in the loss of time in attending his wife. The railroad company plead that he had already secured two judgments and the payments thereon, and should not be permitted to recover more. Is this a good defense?

RULING COURT CASE

Skaglund vs. Minneapolis Street Ry. Co., Volume 45 *Minnesota Reports, Page* 330; *Volume* 11 *Lawyers' Reports, Annotated, Page* 222; *Volume* 22 *American State Reports, Page* 733.

The plaintiff and his wife, while riding on one of the cars of the defendant company, were both at the

same time injured in the same accident caused by the negligence of the defendant. The plaintiff brought an action and recovered the personal injuries which he himself suffered. He then brought this action, alleging that the negligence of the defendant was the cause of the injury to his wife in consequence of which he lost her services and society and was put to expense for securing medical attention for her. The defendant relied upon the plaintiff's former recovery as a bar to the present action.

Decision: The fact that the plaintiff heretofore recovered of this defendant damages for his own personal injuries has nothing to do with his right to recover damages to his marital relation. The husband is entitled to the services and society of his wife, and if, through the negligence of another, he is deprived of them, he is entitled to receive damages therefor. Moreover, he is under a duty to use due care in securing medical attention in his efforts to cure his wife, and such may also be recovered from the defendant. This right is not connected with or related to his right to recover damages for his own injuries, and therefore the former recovery is no bar to the present action.

It was held that the plaintiff could recover.

RULING LAW

Story Case Answer

The relation between husband and wife is a very close and sacred one; but it is not only a sacred and close relation, but it is also a valuable one from a pecuniary standpoint; the wife is her husband's helpmate; she performs many duties; she assists him in many capacities. From this it follows that in case the wife is injured, the husband suffers as well as the wife;

he loses her services, her society, her companionship. Not only this, but he must incur expenses in securing medical attention and in having her properly cared for. If, therefore, the wife is injured through the negligence of a third person, the husband is entitled to sue such person for the damages he suffers. This is a right which is separate and distinct from the right of the wife to recover for her physical pain and suffering from the injury. And even where the husband, suing with the wife, as he is compelled to do at common law, has recovered for the pain and suffering of his wife, he may thereafter bring an action for the damages which the injury has caused to the marital relation. In the Story Case, therefore, Oldfield sets up a distinct cause of action from those he had recovered judgments on previously, and the plea of the railroad company is not good.

E. Right of the Wife for Wrongs Committed in Respect to Her Marital Rights

STORY CASE

James O'Donald and his wife lived in the state of Massachusetts. Their life together had been a happy one until O'Donald and one Mary Laughlin became acquainted. From this time on, Mary Laughlin deliberately won the affection of O'Donald, so that ultimately he neglected his family entirely. Thereupon, Mrs. O'Donald brought an action in Court against Mary Laughlin to recover for damages to the marital relation. The defendant's lawyer put in defense that a married woman could not bring suit in her own name alone, and that her husband could not sue with her in this case because the law would not permit him to be

plaintiff and recover for his own wrong. Is this a good defense?

RULING COURT CASE

Nolen vs. Pearson, Volume 191 *Massachusetts Reports, Page* 283; *Volume* 114 *American State Reports, Page* 605.

The plaintiff brought this action to recover of the defendant damages for the alienation of her husband's affections. The defendant admitted that she purposely persuaded and enticed the plaintiff's husband to commit adultery and to refuse performance of his marital obligations, and also induced him to abandon his home. The defendant answered that a married woman could not bring suit alone.

Decision: Since the law of this state gives to the married woman the right to recover for injury in any form done to her person or her property, the plaintiff may recover in this action. The loss of the essential element of matrimonial fellowship afforded by the husband's society and exclusively given to her by the contract of marriage, when accompanied by his seduction at the inducement of another woman, is an injury as tangible, and from which she may suffer as acutely and with more disastrous consequences to herself than from loss of reputation caused by libel or slander.

It was held that the plaintiff might recover in this action.

RULING LAW

Story Case Answer

At common law, the right of the husband to recover damages of a third person for alienation of his wife's affections, and for damage to marital relations, was well recognized. Seduction of the husband, and the

alienation of his affections was as much of an injury to the wife. But because of the way in which the law looked upon the relation between man and wife, she had no remedy in such a case. Since the wife could not sue alone, but was compelled to sue jointly with her husband, it seemed absurd to the courts that the husband should be suing for damages resulting from circumstances in which he was really a wrong-doer, or at least a participant, himself.

Under modern statutes which gives the wife the right to sue and be sued alone, it is now held that the wife may recover damages of a third person, who seduces her husband, or alienates his affections and persuades him to leave his wife and neglect his marital duties. Since, in the Story Case, O'Donald and his wife lived in Massachusetts where such a statutory law is in force, Mrs. O'Donald's action against Mary Laughlin is good, and the latter's defense is of no effect.

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7. Rights as Between Husband and Wife on Contracts

A. Duty of the Husband to Support His Wife

STORY CASE

Mrs. Josephine Dufree owned a small plot of ground, which her husband repeatedly attempted to have her convey by deed to him. This she refused to do. Finally he threatened to cease to provide for her the necessaries of life if she did not convey to him the property. Thereupon, by way of compromise, she agreed to convey the property to him upon her death, providing he continued to support her. After her death, however, he learned that she had secretly made a will devising the

land to her nephew. Dufree now asks that the contract be enforced against the nephew. Will this be done?

RULING COURT CASE

Ryan vs. Dockery, Volume 134 *Wisconsin Reports, Page* 431; *Volume* 15 *Lawyers' Reports Annotated, Page* 491.

Eliza Ryan, prior to her marriage with the plaintiff, Edward Ryan, was a widow, owning some property. She was blind, lived alone, and consequently was in need of some one to take care of her. The jury found that before her marriage to Edward a contract was made between them by which Edward agreed to take care of, support and nurse her and otherwise see to her comfort as long as she should live; and she agreed, in return for such services, that he should have the use for life of all the property which she owned at her death. Soon thereafter Edward married her. They lived together for some time before she died. After her death he brought this action upon the contract above referred to, and demanded either the use of her property for life, or the reasonable value of his services during the time he cared for her.

Mr. Chief Justice Winslow said in part: "The law requires a husband to support, care and provide comforts for his wife in sickness, as well as in health. This requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its numbers who are ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order."

It results from this that, when the plaintiff promised to care for, nurse and support, the deceased after marriage, he promised only to do that which the law required him to do in any event; and neither the doing of what one is in law bound to do, nor the promise so to do, is any consideration for another's promise.

The plaintiff could recover neither upon the express contract, nor upon one implied in law.

RULING LAW

Story Case Answer

The husband is under a legal obligation to support his wife during the continuance of the marriage relation. This obligation grows out of the marriage contract. Since he is under this obligation to support her, it follows that any contract by which he agrees to support her for a consideration is not binding upon her, even in states where she may be permitted to contract. Such a contract is without consideration; for he is binding himself to do only that which he is legally bound to do. This was true of the contract made between Mr. and Mrs. Dufree in the Story Case. There was no consideration from Dufree, since he was legally obliged to support his wife before making the contract. In fact, there is no contract and none can be enforced against the nephew.

B. Marriage Abrogates Contracts Made Prior to Marriage

STORY CASE

Mary Carlton was a music teacher, and one of her pupils was John Hackett. Hackett became attached to Miss Carlton, and finally persuaded her to marry him.

At the time of their marriage he was indebted to her to the sum of one hundred dollars for music lessons. Subsequent to the marriage, domestic troubles arose, and finally Mrs. Hackett secured a divorce, and the right to her maiden name. Thereupon she brought suit against Hackett for the money originally due for music lessons. He answered that this debt was extinguished by the common law rule that debts existing between a man and woman before marriage are entirely extinguished when they become husband and wife. Miss Carlton maintained in answer to this that the statute in their state, which permitted a woman to retain her separate property, also abrogated the common law rule on this point. Is this correct?

RULING COURT CASE

Farley vs. Farley, Volume 91 *Kentucky Reports, Page* 497.

Mrs. Farley, the defendant in this action, while a single woman, borrowed money of Mr. Farley and gave a note therefor, secured by a mortgage upon the land by her owned. Thereafter they were married. Some time subsequent to the marriage, domestic trouble arose. The husband produced the note in question, demanded payment and, payment being refused, he brought this action thereon, seeking to recover a personal judgment against his wife, and also to foreclose the mortgage which had been executed to him as security for the faithful payment of the note. During the pendency of the action the wife procured a divorce from the husband.

Mr. Jusice Bennett said: "By the common law, marriage has the legal effect of paying or extinguishing the

debt the husband might owe to the wife, or the wife to the husband, at the time of the marriage.* * * If she, at the time of the marriage, held a note on him, the note was, in law, paid; if he held a note on her, it, in law, was paid or extinguished by the marriage."

Was the obligation revived by the subsequent divorce of the parties to the marriage? When they married, the obligation disappeared absolutely, and no subsequent event would revive that obligation.

Accordingly, the husband could neither recover upon the note nor foreclose the mortgage.

RULING LAW

Story Case Answer

At common law the marriage of a man and woman extinguishes all contracts between them. If the man owed money to the woman, or if the woman owed money to the man, their marriage extinguished the obligation in either case. The fiction that husband and wife are one in legal contemplation is the basis of this result.

Nor is the obligation revived by the divorce of the parties. The marriage extinguishes the obligation, and no subsequent event will revive the obligation. The better rule, as adjudicated by the New York Court in the case of *"In the Matter of Collister," Volume* 153 *New York Reports, Page* 294, is that the common law rule is not changed by the statutes giving the wife the right to retain her separate property. Even though the wife has the right, any debts existing between them at the time of marriage are extinguished. Therefore, Miss Carlton cannot recover in the Story Case.

C. Contract Made After Marriage

STORY CASE

Mrs. Hazel Brown, a dramatic teacher, agreed to teach her husband the art of making speeches, provided he promised to pay three dollars for each lesson. She had given him a total of one hundred lessons, and he had paid her fifty dollars when domestic troubles arose between them and the work was stopped. Subsequently Mrs. Brown secured a divorce from her husband. After the divorce, Mrs. Brown demanded the balance due for the teaching work, and Brown refused to pay. In an action brought for the purpose of collecting the money, Brown defended on the ground that a contract never existed, since a man and wife could not make contract together. Is this defense good?

RULING COURT CASE

Anna Bassett vs. Isaac Bassett, Volume 112 *Massachusetts Reports, Page* 99.

Anna Bassett was married to the defendant, Isaac Bassett, May 3, 1866. At the time of the marriage, she owned, and had in her possession, money which was the earnings of her personal labor before marriage. After marriage, at the request of her husband, she let him have at different times sums of money amounting in all to $620 on his oral promise to return it. After frequent requests for the money, the husband executed to her a promissory note for the repayment of the sum in question. At or about that time he left her and refused to live with her. He also refused to pay or recognize the note.

She thereupon brought this action upon the note against her husband.

Decision: The plaintiff cannot recover upon this note because it is void; it never had any binding effect upon the husband from the beginning. During marriage neither party to the marriage can enter into a binding contract with the other.

Mr. Justice Gray said: "The defendant is not liable upon this note, because no contract between husband and wife for the payment of money has any validity at law."

Judgment was given for the defendant.

RULING LAW

Story Case Answer

If all contracts made previous to marriage become void upon marriage of the parties to it, a *fortiori* husband and wife can make no contracts after marriage. It is a well settled rule that husband and wife can not enter into a contract with each other during marriage. Some courts give as their reason the fiction that man and wife are one in contemplation of law, and it would be both impossible and absurd for a person to contract himself. The real reason seems to be that the policy of the law is to refuse to recognize such contracts, for fear that they might be the result of coercion brought to bear upon the wife by the husband. In the Story Case, the answer of Brown is a good defense and Mrs. Brown cannot collect the balance due for her teaching work.

D. Gifts Between Husband and Wife May Be of No Legal Effect

STORY CASE

Earl Day gave an automobile to his wife, Helen, as a Christmas gift. Shortly after this, a dispute occur-

red between them, and Day took possession of the automobile without the consent of his wife. She thereupon sold the machine to Arnold Hey, who demanded possession from Day. Upon his refusal to deliver the machine, Hey brought an action in replevin to compel Day to surrender the property. Whether or not the action can be maintained depends upon whether Day had the right to take possession from his wife.

RULING COURT CASE

William H. Rixford vs. Mary Manning, Volume 44 *Illinois Reports, Page* 129.

On February 11, 1865, the plaintiff was united in marriage to Mary E. Rixford. A few days before his marriage he had enlisted in the army of the United States, receiving therefor a bounty of $400. After his marriage, and before leaving for service he turned the money over to his wife. On the 21st day of the same month, Mary loaned $365 of this money to the defendant, Mary Manning. For the repayment thereof, a note was given by Mary Manning payable to Mary E. Rixford. Upon his return from the war, William procured possession of the note in question and brought suit thereon against the defendant. It was contended by the defendant that William could not sue upon the note, because the note was made to Mary Rixford for money which the latter owned and had loaned to the defendant.

Decision: On the hypothesis that the money in question was a gift from the husband to the wife, such transfer is void at law and may be recalled by the husband. This being the case, the act of the husband in bringing suit was a sufficient act to revoke the gift.

He was entitled to recover thereon.

RULING LAW

Story Case Answer

At common law, personal property could not be given by the husband to the wife. Such an attempt was without any effect. He was entitled to all her personal property. The very moment that title to personal property became vested in her, title thereto automatically passed to the husband. Obviously under these circumstances, the husband could make no gift of personal property to his wife. The courts, however, early made one development from this strict rule in recognizing that a husband might give the wife property as her sole and separate estate, and such a gift is valid and binding.

In the Story Case, it is not stated that there was any express intention to have the automobile considered as the sole and separate estate of the wife, and therefore Day could recall the gift at any time. He has the legal right and title and Hey's action cannot be sustained.

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8. Crimes of Husband and Wife

A. Crimes Committed by the Wife

STORY CASE

Jane, the wife of Henry Sanaman, became angry at Sarah Hart and proceeded to punish her with a heavy weapon. Sanaman was present and admonished his wife for her action. She did not heed him, however, and severely beat Miss Hart. Following this, Miss Hart filed criminal charges against both Mr. and Mrs. Sanaman for assault and battery. There was no question as to the guilt of the wife. The only question with

the Court was with reference to Sanaman's guilt. Sarah Hart maintained that he was responsible, since he was present when his wife committed the wrong. Is this correct?

RULING COURT CASE

State vs. Mulvey, Volume 43 *Alabama Reports, Page* 316; *Volume* 94 *American Decisions, Page* 84.

Mrs. Mulvey, the defendant's wife, kept and owned a grocery store. On a certain day, when both the defendant and his wife were present, one Collins and a friend went into the store and called for some whiskey. Mulvey directed his wife, who was behind the counter, to give them the liquor, which she did, and received twenty cents in payment thereof. Neither had a license to sell liquor. The husband was indicted and tried for having sold liquor without a license. The defendant claimed that he should not be held criminally responsible for this act of his wife; that he was in no wise connected with the store; that his wife was the exclusive owner of it; and that he had an independent employment.

Decision: The Court was of the opinion that he might be punished criminally under these circumstances. Although the immediate act, which constituted the violation of the law was done by his wife, it was done in his presence and at his direction, and he is responsible therefor.

RULING LAW

Story Case Answer

By law, the husband is given the right and power to control and regulate the conduct of his wife. This is not only a right and a power, but he is under a duty to

see to it that she engages in nothing that is illegal or contrary to law. If the wife, in his presence or at his direction, commits a crime, the husband may be prosecuted criminally therefor.

When the wrong is done in the presence of the husband, it is presumed that the wife acted under the coercion of the husband. If she acts under the coercion of the husband, she may not be prosecuted criminally; but in any case, where it appears that she has taken an active part in the crime, she may be prosecuted jointly with the husband or alone. This presumption, that the wife acts under the influence of the husband because the wrong is committed in his presence, may be rebutted by the husband so that he will go free. That is, *prima facie,* the case is against him, but if he shows that in fact she was not under his influence, then he has given sufficient evidence to have the action dismissed as to himself. Sanaman of the Story Case could no doubt do this.

AGENCY

I. AGENCY IS A RELATION CREATED BY CONTRACT

1. The Agent Is One Who Is Under the Control of His Employer

STORY CASE

A statute of the State of Kansas provided that if any agent shall neglect or refuse to deliver to his employers on demand, money which should be turned over to such employers, then the agent should be guilty of embezzlement. John Abbott, a private banker, was employed by Simon Bellows, for a consideration, to keep custody of a certain sum of money, to pay out the money as Bellows directed, and render an account to Bellows at the end of each month. Six months after this agreement was made Bellows demanded the balance held, and was refused payment. Abbott was thereupon indicted under the above statute. His defense is to the effect that he was not an agent, but a debtor of Bellows. What should be the decision of the court?

RULING COURT CASE

Sternaman vs. Metropolitan Life Insurance Company, Volume 57 *of the Lawyers' Reports Annotated, at Page* 319.

In this case it appears that Sternaman made an application to the Metropolitan Company for insurance upon his life. The application consisted of two parts, A and B. Part A contained questions and answers concerning the age, occupation and family history of Sternaman. Part B was entitled: "Statements made

to the Medical Examiner", and consisted of about a hundred questions in fine print relating to the health of the applicant, Sternaman. At the close of these questions and answers there was an agreement that the medical examiner was the agent of the applicant, and not of the company. It appears that Sternaman had answered correctly every question which was asked him by the medical examiner, but that the medical examiner had not correctly set them down in the application.

This was an action by the beneficiary of Sternaman upon the policy. The right to get the insurance turned mainly upon the question as to whether the medical examiner was the agent of the applicant or of the company.

Justice Vann, rendered the decision.

The Court held that he was the agent of the company. He was under a contract to do certain work for the company; he was under its control and direction, from it received his authority and compensation. From the applicant he received nothing, and to him sustained no relation.

The judgment of the Court was for Sternaman, the plaintiff, since the wrong was not committed by his agent, but by the agent of the insurance company.

RULING LAW

Story Case Answer

From the standpoint of a business man, there probably is no other branch of the law so important, as that commonly termed: "The Law of Agency". Time was when business relations were rather simple, and in those times the functions to be performed by an agent

were not many. As business relations became more complex the functions of an agent increased.

On the very threshold of the subject it must be asked: "What is agency?"

(1) Agency is a relationship. By this is meant that the parties are so related to each other that certain mutual rights and duties spring up which never existed before the creation of the relationship.

(2) This relationship exists between one person called the principal and another called the agent. In other words, A, who wishes to get something done, engages B to do it for him. The former is called the "principal", and the latter the "agent".

(3) This is a relationship assumed by agreement of the parties to it. It is obvious that one may not go out and act as agent for another without the consent of the latter. Nor is it necessary for a person to act as agent unless he chooses to act, and act for a particular person.

(4) This relationship gives to the agent the power to represent and act for the principal, in dealings with third persons. This needs no further comment than to say that so long as the agent acts within the scope of his authority the rights and liabilities of the principal are the same as if he himself had conducted a given transaction.

Having thus examined in certain details the constituent elements of this relationship, let us sum them up in a definition: "Agency is a relationship assumed by agreement of the parties thereto, which gives to one person, called the agent, the power to represent another person, called the principal, in dealings with third persons."

In the Story Case, Abbott is the agent of Bellows because he is employed by the latter and works under his control. Therefore his defense is not good.

II. AGENCY IS DIFFERENT FROM OTHER CONTRACT RELATIONSHIPS

1. Agent and Servant

(a) An Agent Is a Person Who Represents His Principal in Dealing With Third Persons

(b) A Servant Is a Person Who Acts for His Master in a Ministerial Capacity

STORY CASE

William Avery called up the office of the Northern Transfer Company and requested that an auto truck be sent to his factory to carry a number of packages to the freight station. When the truck arrived, Avery asked the driver what the charge would be for six trips and the driver answered that he would make a reduced rate to Avery of three dollars per hour. The driver worked a total of five hours. At the end of the month the transfer company rendered a bill for $20, charging the usual rate of $4 per hour. Avery refused to pay more than $15, on the ground that his contract was for that amount. The transfer company contended that the driver was only a servant and had, therefore, no authority to contract. Suit was brought for $20. For whom should the finding of the Court be made?

RULING COURT CASE

James Moore vs. Solomon Teekle, Volume 144 *Ohio Reports, Page* 421.

The plaintiff was the owner of a stallion which he hired out for breeding purposes. The price of services was advertised as $5 for the season. The stallion was put with the mare for that period.

The defendant contended that he should only pay $3.50 since the groom, who had the stallion in charge made a special agreement to that effect.

If the groom was an agent with power to negotiate with third persons, there might have been such liability; but the plaintiff contended that the groom was a mere servant who could exercise no such discretionary authority.

Justice Moore gave the decision of the Court.

The Court held that the groom was a mere servant, whose only power was the charge and care of the horse; and as such servant he had no power to bind his principal to a contract. Therefore judgment was given for the plaintiff.

RULING LAW

Story Case Answer

The relation of master and servant is very similar to that of principal and agent. The terms agent and servant are often interchangeably used. It is, indeed, very difficult to determine the exact and fundamental difference between them. It is sometimes said that it is a difference, not in kind, but in degree.

Roughly speaking, an agent is one who represents his principal with the special end in view of making contracts for his principal with third persons. On the other hand, a servant is one who acts for his master in a mere ministerial capacity. He performs menial tasks; he is not given a great deal of discretion; he deals with things. Often, of course, he may deal with

persons, but has no power to make binding contracts for his principal. To the extent that he may bind his principal upon contract is he an agent and not a servant.

To illustrate the foregoing distinction; if A sends X out to buy a horse for him; X, in purchasing the horse, is acting as an agent. But if A has already made the purchase and sends X to bring the horse home, X is acting then as a mere servant.

In the Story Case, Avery had already made his contract with the transfer company, and since it failed to expressly stipulate a price when the truck was ordered, the customary price was intended. The driver of the truck was a mere servant, without authority in this case to contract.

However, if it had appeared that there was a custom prevailing in that community whereby the drivers of trucks were allowed to make contracts at reduced rates, for a series of trips, then the driver could have bound the transfer company. The custom would have been included within the powers of the driver, even though nothing concerning such custom was mentioned between Avery and the transfer company.

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2. Agent and Independent Contractor

(a) An Agent Works Under the Control of the Principal

(b) An Independent Contractor Agrees to Produce Results and Is Free to Use His Own Means

STORY CASE

Fred Moore made a contract with John Samson, whereby the latter agreed to sell merchandise for the former. Samson agreed to pay a stipulated price to

Moore for all goods which were ordered, to maintain his own office and not charge any expense to Moore. Samson had the right to sell the goods at any price he could get, and to devote as much time to the work as he chose. During the course of his business Samson accepted certain commercial paper which he knew was defective and which he could not collect. He passed the paper on to Moore, who had no knowledge of the defect of the paper. When Moore brought suit on the notes, the defendant set up the defense that Moore could not collect since his agent, Samson, knew of the defect, and knowledge of the agent is knowledge of the principal. The case turns on the question whether or not Samson is an agent or independent contractor.

RULING COURT CASE

Powell vs. The Virginia Construction Company, Volume 88 *Texas Reports, Page* 692.

The Virginia Construction Company was under a contract to build the Midland Railroad from Memphis to Jackson. It sublet to Meredith and Horton the laying of track from a point near Memphis toward Jackson as far as the chief engineer might determine and order, at the price of $475 per mile.

Meredith and Horton agreed to unload the rails, ties and fastenings on their arrival, to reload and unload them in making their distribution, and to lay and surface the tracks. The construction company agreed to furnish push cars, locomotives, flats and engineer, firemen and one brakeman, to be used and controlled by Meredith and Horton in doing this work. The whole work was to be done in a thorough and workmanlike manner, to the satisfaction of the chief engineer of the construction company.

The facts showed that the servants furnished by the construction company were competent, but that Meredith and Horton selected an engineer by whose negligence the plaintiff, Powell, was injured. The liability of the company depended upon whether Meredith and Horton were agents who had employed a subagent, the engineer, or whether they were independent contractors.

Justice Hughes submitted the opinion.

The Court held that Meredith and Horton were independent contractors, since they were to produce results; that the crew furnished with the construction train were servants of Meredith and Horton, since they were under the control of the latter, and that the Virginia Construction Company was not liable to the plaintiff for the injury he sustained. The finding of the Court was for the defendant, because the injury was not caused by an act of the company's servant.

RULING LAW

Story Case Answer

Here we must distinguish between agent and servant on the one hand, and independent contractor on the other. This is a very important distinction upon which turn many questions concerning the rights, duties and liabilities of principal and master.

Anticipating matters which will be considered hereafter, it may be said to be the general rule that the principal is liable for all acts of his agent while acting within the scope of his authority. But, generally speaking, a master is not liable for any of the acts of an independent contractor.

This difference in liability turns upon the difference in the two relations. As between principal and agent,

the principal has the right to direct, control and supervise all acts and movements of his agent. Whether he exercises his right or not is not material in fixing his liability for the acts of his agent. On the other hand the master or employer reserves no such control and power over an independent contractor. The employer contracts that certain results shall be attained, leaving to the contractor the selection of the means and supervision of the operations by which those results are to be attained.

In the Story Case, Samson was an independent contractor since he was not working under the control or supervision of Moore. Samson agreed to sell goods and retained the right to determine the means and manner of selling.

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3. Agent and Tenant

(a) An Agent Acts Under the Supervision of a Principal

(b) A Tenant Is an Independent Contractor, Who Agrees to Produce Results Under His Own Supervision

STORY CASE

The Southern Mills Company owned a mill located upon a stream which ran through John Fiske's land below. The mill company made a contract with Frank Bird. This contract was called a lease, the company being the lessor and Bird the lessee. Bird agreed to run the mill for a year, and to manufacture for the company from their own cotton, goods at a specified price to be paid by the company. The company reserved the control over the output. Bird agreed to keep the mill in running order, except the main gearing and the dam, which the company agreed to keep in

good condition. Bird was not charged any rent. On one occasion, Bird was careless and the water escaped from the pond. The land of Fiske was, in consequence, flooded and damaged. Fiske sued the company on the ground that Bird was an agent for whose act the company was liable. The company maintained that Bird was a lessee, and that, consequently, there was no liability on their part for his acts.

RULING COURT CASE

State vs. Page, Volume 40 *American Decisions, Page* 167.

The Charleston Hotel Company owned a furnished hotel in the City of Charleston. It entered into a contract with Page, the significant provisions of which follow: The company agreed "to let the hotel to Page for a term of seven years." Page, "as landlord," agreed to provide for the hotel and to contract no debts on account of the concern without the consent of the directors of the company. The company also agreed to pay Page a certain sum annually as compensation.

The sheriff went to the hotel to levy execution upon the furniture as property of the hotel company. Page contended that he was lessee of the property and that the sheriff had no right to touch it. He was indicted for resisting the sheriff in levying the execution. If he was a lessee, he was justified in resisting the officer.

Justice Armstrong gave the decision: The Court held that Page was a mere agent, and that he had no right to resist the sheriff in levying execution upon the hotel company's property.

The Court said that the substance of the relationship must be looked at, and though the words used might in some ways resemble relation of landlord and

tenant, the facts showed that it was merely an agency, since Page acted under the control and supervision of the directors. The verdict was pronounced against the defendant.

RULING LAW

Story Case Answer

A tenant is one who engages from another, called the landlord, the use of property of the latter for a limited period of time. Generally, in such a case, the landlord is not liable for the acts of the tenant. Ordinarily a tenant, as such, has no power to charge the landlord with any liability.

Very little difficulty will be encountered in determining, in a given case, the distinguishing feature between these two relations. Sometimes, however, a person wishes to engage in some business, the ultimate success of which is doubtful. He wishes to get the profits, if any accrue, but he desires to escape any possible liabilities from the business. With this end in view he may purport to lease the business to some irresponsible third person.

Though the intention of the parties will ordinarily control in determining the nature of the relation, the relation must be assumed in good faith and with no aim of defrauding third persons. If it appears that the alleged lessee is paying only a nominal rent and that the alleged lessor is really in control, and getting the profits of the business, the courts do not hesitate to disregard their nominal intention and hold that it is in fact an agency.

This is the situation in the Story Case. Bird is in fact an agent acting under the control of the company. Therefore the company is liable for his carelessness.

III. AGENTS MAY BE CLASSIFIED AS TO THE MANNER OF THEIR CREATION OR AS TO THEIR FUNCTIONS

1. Agency May Be by Express Words or May Be Implied

STORY CASE

John Hamilton informed Simon Brown that Joseph Barr owned a horse which was an exact match for another horse belonging to Brown. The latter thereupon said to Hamilton: "See if you can buy him for me for $300." Following this conversation, Hamilton saw Barr and offered him $275 for his horse, which offer Barr accepted. Hamilton then told Brown that he had made a contract for him to buy the horse. Brown refused to abide by the alleged contract, saying Hamilton had no authority to act as agent, and he (Brown) didn't want the horse. Barr brought suit on the contract alleging that Hamilton was the express agent of Brown. Can he recover?

NOTE: In answering this question it is not material, as will be explained later, that the negotiations are not in writing, and it is not material whether Brown's name was mentioned when the offer was made by Hamilton. The question is whether or not an agency was created by Brown's statement to Hamilton.

RULING COURT CASE

Long vs. Colburn, Volume 11 *Massachusetts Reports, Page* 97.

This was an action upon a promissory note made in the following form:

No. 273. Boston, March 17, 1812.

$301.

For value received, I promise to pay Mr. Edward J. Long, or order, on demand, three hun-

dred and one dollars, with interest, after four months.

(Signed) Pro William Gill—J. S. Colburn.

As the note indicates, it was made by Colburn for Gill.

Justice Gorham gave the opinion. The Court said: "He signed his name Pro William Gill, and the plaintiff's remedy is against Gill, if Colburn had the authority to make the promise for him. The authority may be by parol, by letter, by verbal directions, or may even be implied from certain relations proved to exist between the actual maker of the note and him for whom he undertakes to act; and it may sometimes be inferred from the subsequent assent or ratification of the party who is charged by the writing." The evidence showed that an agency existed by express verbal directions and therefore action on the note is not good against Colburn, but must be brought against his principal. Judgment was given for the defendant.

RULING LAW

Story Case Answer

Classes of Agents: Agents may be classified in a variety of ways, depending upon the angle from which the relation is considered.

In respect to the mode in which an agent receives his power to bind the principal, they are classified as: (1) Actual Agents. (2) Agents by Estoppel. (3) Agents by Law.

An Actual Agent is one who acts with the full consent of the person whom he represents. His authority may be expressly conferred by writing or by word of mouth or it may be implied from previous dealings between them.

Agent by Estoppel. If a person allows another to act for him, or leads third persons to believe that such person is acting for him, he may be bound by the acts of such person, even though it was never his intention that he should be bound. Such a person is called an agent by estoppel.

An Agent by Law is one who has power to bind another, not by virtue of any consent of the one bound, but because the power is conferred upon the agent by law. This is typified in the case of a married woman pledging the credit of her husband for necessaries, when he refuses to support her. The wife is given this power by law, regardless of the consent of her husband.

In the Story Case, Brown expressly authorized Hamilton to act as his agent when he said: "See if you can buy him, etc." Brown is liable as principal on the contract. The authorization intended was to limit Hamilton to the purchase price of $300 for the horse, but if Hamilton could get it for less he was completely empowered to do so.

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2. Agency May Be Del Credere or Non Del Credere

STORY CASE

Harry Lea contracted to act as Chicago agent for the Boston Garment Company, for which he was to receive ten per cent commission from all goods sold, and two per cent for guaranteeing the accounts of his customers. Lea had one customer who purchased $10,000 worth of goods during a year's time, paying cash therefor. Lea retained a commission out of the total of $1,200. Later, the Boston Garment Com-

pany learned that this one customer paid cash and they demanded, thereupon, a return of $200. Can the Boston company legally enforce this claim?

RULING COURT CASE

Swann vs. Nesmith, Volume 7 Pickering Reports, Massachusetts, Page 220.

Nesmith was a commission merchant, and in the course of his business as such, received goods from Swann to sell for the latter. At the time Nesmith received the goods there was an oral agreement made between them by which Nesmith said that he would guarantee all sales made by him. In other words, that he would guarantee collections in all sales made by him. Nesmith sold goods to certain persons who gave their notes in payment therefor. Thereafter these persons failed so that no collection could be made from them. Swann thereupon sued Nesmith upon his guarantee that collections would be made for all sales.

Nesmith contended that his undertaking was to pay for the goods, provided the persons to whom they were sold did not. He was therefore a surety, he insisted, and not liable because his undertaking was not in writing, as required by the Statute of Frauds.

Decision: A *del credere* agent is one who guarantees collection of the purchase price of goods by him sold on account of his principal. He does not merely say that he will pay unless another does. He undertakes to pay absolutely. He becomes a principal debtor to the one for whom he acts. Therefore, being a principal debtor, his undertaking is original and need not be in writing, in order that it may be enforced against him.

Mr. Chief Justice Parker, who delivered the opinion of the Court, said in part: "Evidence was objected to, on the ground that by the Statute of Frauds, a contract of guaranty, to be binding, must be in writing, and that oral evidence to prove it was not admissible. Now this depends upon the question whether the undertaking of the defendant to guarantee the sales was original or collateral. The defendant was a commission merchant, and as such they received the goods for sale in the way of their business. The evidence went to show that when they received the goods they guaranteed the sales; for this they had their commission, and, in merchantile language, it was a *del credere* commission. The legal effect of such a contract is to make them liable at all events for the proceeds of the sale."

Judgment was given for Swann.

RULING LAW

Story Case Answer

A distinction is made between a simple agent and a "*del credere*" agent. Where an agent is authorized to sell his principal's goods on credit, if he exercises due care in making the sale, he is not liable in case the collections are not made. In this respect he is a simple agent. But it not infrequently happens that in consideration of higher compensation or higher commission, an agent will undertake to guarantee the collection of such claims. In this event he is said to be a *del credere* agent. A *del credere* agency does not change the status of the parties. The purchaser is still the primary debtor to the principal, and the principal is the creditor. The agent gives an added guarantee that the goods will be paid for according to contract.

In the Story Case, when Harry Lea made the contract agreeing to guarantee all of his own accounts with the Boston Garment Company, he then was under the risk of not being successful in securing cash accounts. If later he should secure such accounts, this should operate in his favor, and he should receive his *del credere* commission. The Boston Garment Company cannot enforce this claim.

IV. A PRINCIPAL MUST HAVE GREATER CAPACITY TO CONTRACT THAN AN AGENT

1. The Principal Must Have Capacity to Do That Which He Has Authorized the Agent to Do

STORY CASE

Marie Brown, a woman sixty years old, made a contract with Howard Harvey, authorizing him to dispose of certain real property for her. Later the heirs of the woman contested the authority given to Harvey and therefore the conveyance made by him, on the ground that the principal, Mrs. Brown, had not the capacity to contract or make a conveyance of the property herself. It was shown that she had been deaf and dumb since she was fifty years old, and that she could convey no ideas to others or receive any except a few simple ones in doing very simple housework. Assuming that she had not the capacity to manage her own business, of what effect is the authority given to Harvey?

RULING COURT CASE

United States vs. Grossmayer, Volume 9 *of Wallace's United States Supreme Court Reports, Page* 72.

When the war of 1861 broke out, Eiustein, a resident of Macon, Georgia, was indebted for goods sold to Grossmayer, a resident of New York. While the war was in progress, they continued correspondence in regard to it, through a go-between.

They finally agreed that Eiustein was to invest the money in cotton and hold it for Grossmayer until the close of the war. Eiustein bought the cotton, and shipped it as Grossmayer's to Savannah for storage. The Union army entered that city and the cotton was taken as booty.

This is a claim filed by Grossmayer against the United States, alleging that he comes within the protection of the Captured and Abandoned Property Act.

The Court conceded that a creditor may have an agent in an enemy's country to whom his debtor there may pay a debt contracted before the war. But in this case the appointment was made after hostilities began. So the appointment was void. The capacity to make a contract did not exist between Eiustein and Grossmayer, and therefore the latter did not have the power to create an agency. Grossmayer cannot recover.

RULING LAW

Story Case Answer

It is sometimes stated as a general rule, that a person may do through an agent anything which he himself might do. This general rule is subject, however, to several important limitations. There are some things which a person is not permitted to delegate to another. A person cannot vote at a public election by an agent, nor can he take an oath by an agent, or make

a will. Where he acts in a fiduciary relation or capacity, as a trustee, he cannot act by an agent. Ministerial acts, or acts sanctioned by custom or commercial usages may be turned over to be done by an agent. When a person is engaged to perform personal services, which require his personal skill, he cannot delegate the doing of this to an agent.

It has already been seen that the relationship of agency contemplates the principal turning over something to be done by one called an agent. The theory of the relation is, however, that the principal himself does them. From this it naturally follows that one, who has not the legal capacity to do a thing himself, cannot appoint some one else to do it for him. A blind person may not have the physical capacity to make a written contract, but he may nevertheless have the legal capacity to do it through an agent. Citizens in countries at war cannot contract with each other, and therefore, one cannot be the principal of the other. An insane person has not the legal capacity to contract personally. Consequently, he cannot empower an agent to contract for him. In conclusion, it can be stated as a general rule that a person can act through an agent to the same extent that he might have done the same things himself. This is subject to the limitations above noted.

In the Story Case, the authority given to Harvey would have no effect whatsoever. Mrs. Brown could not act for herself, and therefore could not appoint an agent to act for her. In matters where a person is incapacitated from acting himself, he cannot appoint an agent to act for him.

2. An Agent Need Not Have the Personal Capacity to Do That Which He Has Been Authorized to Do

STORY CASE

Thomas Wood and James Brady entered into a partnership agreement to conduct a bond brokerage business. Brady was twenty years old. During the course of the first year's business Brady made a number of partnership notes, signing the firm name "Wood & Brady," and kept the money without the knowledge of Wood. Later when suit was brought upon the notes against Wood, he set up the defense that Brady was a minor with no authority to sign notes. Is this a good defense?

NOTE: In the law of partnership, each partner is the agent of the other.

RULING COURT CASE

Talbott vs. Brown, Volume 44 *Illinois Reports, Page* 66.

This was a suit brought by Brown to recover title to certain land alleged to have been sold by Talbot's son and agent. Talbot claimed that, since his son was a minor when the contract of sale was made, Brown had no legal right to insist upon a conveyance. The Court held that if the infant was authorized by his father to make the conveyance, the mere fact that he is an infant can afford no defense to Talbot; for, although the contract of an infant is not binding upon him, he can act as an agent, their contracts made in that character will be binding upon the principal to the same extent as if such agent were an adult.

RULING LAW

Story Case Answer

A person cannot do through an agent what he himself might not have done. No such high degree of capacity is requisite for one to act as agent. The principal must act independently. He relies upon his own judgment and skill. He is bound by acts and contracts. But the agent acts dependently. He relies, not on his own, but on the principal's judgment and skill, and as a rule no liability is imposed upon him for his acts. Consequently a very high degree of capacity is not required of him.

It is sometimes said that an agent must have at least a minimum amount of intelligence. However that may be, so long as a principal is willing to trust such a person, most any one should be able to act as agent, except in so far as statutes have enforced restrictions upon certain classes of agents.

In the Story Case, the fact that Brady was a minor is immaterial. Wood was of age with authority to act, and therefore he could authorize Brady to be his agent.

V. THE RELATION OF AGENCY MAY BE FORMED IN TWO WAYS

1. The Appointment May Be by Act of the Principal Prior to the Agent's Dealing With Third Persons

A. The Formal Requisites Depend Upon the Powers Given to the Agent

(1) Generally No Particular Form Is Necessary in Appointing an Agent

STORY CASE

Henry Drew asked George Fowler to buy a Buick automobile for him when he made his trip into the city,

explaining also the type of car he desired. Fowler replied he would buy the car. Thereupon, when in the city, Fowler purchased a car, taking it in the name of Drew, who was a wealthy farmer with considerable credit in that community. Drew later refused to take the car, on the ground that no contract existed between himself and Fowler; that a mere request does not complete an agency, and therefore the latter had no authority to make the purchase. Is this defense good?

RULING COURT CASE

Schneider vs. Schneider, Volume 98 *of the Northwestern Reports, Page* 159.

One Casper Schneider died leaving considerable property in the state of Iowa. His next of kin and heirs at law were: A widow, confined in an insane asylum, and a sister, who lived in Germany and who had never been in America.

One Wessling was appointed administrator. He at once communicated the circumstances to the sister in Germany. She immediately began to make plans to get a lawyer in this country to settle up her affairs. Wessling wrote back and told her all American lawyers were a set of knaves and would charge her an exhorbitant price for their services and that he could do it much more cheaply. She said nothing but acquiesced in his plans.

He falsely informed her that it would be many years before she could get any benefit from her brother's estate, and that, out of consideration for her, he was willing to pay her $1,000 for her interest if she wished to sell. She consented and made out the conveyance. As a matter of fact, her interest was probably worth twice as much as she received. She after-

ward filed a bill to have the conveyance set aside and a partition of the property declared.

The Court held that she was entitled to have the relief asked for. It was said that Wessling became an agent by his very conduct with her and her assent to his proceedings with the property. It is a fundamental rule that when an agent purchases from his principal he is held to the highest faith and strictest accountability. Wessling here was an agent by conduct and he did not act in good faith. The conveyance made by Wessling was set aside and a partition of the property declared.

RULING LAW

Story Case Answer

As a general rule no particular form is necessary in appointing an agent. The principal may give authority in writing, or he may give it by word of mouth. In some cases the agency relation is implied from the circumstances without writing, word of mouth or contract conferring the power.

In the Story Case, sufficient negotiations passed between Drew and Fowler to enable Fowler to act as agent. It was not necessary that all the terms of their understanding be expressly stipulated between them. It was only necessary that Drew authorize Fowler to act. Drew is liable on the contract made by Fowler in purchasing the machine.

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(2) An Agent Need Not Have Written Authority to Make a Written Contract

STORY CASE

George Beal said to his construction foreman: "When the contract for building the Kaiser House is

ready, you sign it for me, in my name." Later, when the contract was ready, the foreman signed it in the name of the principal, as he was instructed to do. Two weeks later Beal defaulted in this contract, refusing to do anything under it. When suit was brought on the contract, Beal defended on the ground that the foreman had not the authority to act, since this was a parol instruction to sign a written contract, and therefore not good. Is this a valid defense?

RULING COURT CASE

Hedrick vs. Piercy, Volume 98 *of the American Decisions at Page* 774.

One John Piercy was given parol authority by his father and uncle to settle a certain controversy with Hedrick and to sign their names to bonds given for the settlement of the controversy. In accordance with this request, John Piercy settled the controversy and gave a note for $100, and signed the names of his father and uncle, by himself, as agent.

In an action upon this note it was contended by the obligees of the note that the authority of the agent should have been in writing. Justice Maxwell rendered the opinion: The Court held that since the act of the agent was not done under seal and did not pertain to land or other matter covered by the Statute of Frauds, there was nothing to prevent John Piercy from executing the note in question under parol authority and that written authority was unnecessary. Therefore the defendants, the father and uncle, are liable on the note, and the finding is for Hedrick, the plaintiff.

RULING LAW

Story Case Answer

Unless some statute otherwise provides, the grant of authority need not be in writing. An agent need not have written authority to make a written contract. A written contract and a parol contract are said to be of the same rank. We will note later, however, that the Statute of Frauds requires that certain contracts must be in writing. This is not true, however, of the usual agency contract, i. e., contracts not having reference to land or work to be done more than a year from the time when the contract is made. Since, in the Story Case, the act done by the agent was merely the signing of the building contract, authority to do this need not be in writing and Beal is bound by the contract.

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(3) The Statute of Frauds Requires That Certain Agency Contracts Be in Writing

STORY CASE

Arthur Bowers said to Abel Hansen: "If you will work for me one year, beginning the first of next month, I will pay you $100 a month." Hansen replied that he would accept the offer and begin work on the first of the following month. A week later, on the first of the month, in accordance with the contract, Hansen appeared, ready to work. Bowers then informed him that his services would not be required. Hansen brought suit upon the contract, and Bowers put in as defense that Hansen could not recover because the contract was one which could not be completed within a year from the date of its making, and

therefore could not be enforced since it was not in writing. Is this correct?

RULING COURT CASE

Myers vs. Roberts, Volume 46 *of the Arkansas Reports, at Page* 80; *also Volume* 55 *of the American Reports, Page* 567.

In this case, Roberts complains that on October 13, 1882, he had been employed by Meyer as manager of the latter's plantation for the remainder of that year and also for the following year, provided neither of the parties should object on the first day of January, 1883, to the continuance of the arrangement; that Meyer agreed to pay him $100 per month and to allow him a house free of rent; that he entered upon the work and continued as manager until May 1st, 1883, when Meyer discharged him without cause. It appears that Meyer paid him for his services already performed and that he discharged him for the reason that he decided that the wages were excessive.

Roberts in this action asks damages caused by being thrown out of employment for the remainder of the year. Meyer insists that he was not legally entitled to any such damages because their agreement was under the Statute of Frauds. Meyer further claims that the agreement was unenforcible, because it was not to be performed within a year's time.

By statute in Arkansas, substantially the same as in most states, it was provided that no action shall be brought to charge any person upon any contract that is not to be performed within one year from the making thereof, unless the contract or some memorandum or note thereof shall be made in writing, signed by the party to be charged or by his agent.

Justice Smith gave the decision: "A contract for personal services to continue and hold the parties together for a longer period than one year is plainly within the statute. Thus, if at Christmas, I orally hire a servant for a year, to begin New Year's Day, I am not legally bound to receive him into my services when he presents himself at the time appointed in fulfillment of that contract. If I do receive him, I may afterwards discharge him without incurring any other liability than the payment of his wages for the time he actually served." In accordance with the foregoing principles announced by the Court, it was held that Roberts could not recover for the unexpired part of the contract.

RULING LAW

Story Case Answer

The Statute of Frauds, which has been substantially re-enacted in most states in this country, provides that no action shall be brought upon any oral agreement that is not to be performed within one year from the making of the agreement. From this it follows that, where oral authority is conferred upon the agent which contemplates his serving the principal for more than one year from date of appointment, neither agent nor principal has any remedy for non-performance by the other. This is true even though either reserves the right to terminate the relation before the end of the year. The Statute of Frauds of most states also requires that all contracts, pertaining to the sale of land, must be in writing in order to be good in the courts. Therefore a contract appointing an agent to make other contracts, having reference to the conveyance of land, must be in writing under the statutes.

In the Story Case, the defense of Bowers is not good, since to make the contract enforcible in the courts, it should have been put in writing, or Hansen should have had some written statement from Bowers acknowledging the contract. It will be well to note in this connection that the writing required by the statutes may be made at any time before the suit is actually brought; that the contract made by the parties is not void, but merely is incapable of being enforced in the courts, until the memorandum is produced. The purpose of these statutes is to prevent fraud and perjury, should it be required to prove the existence of such contracts from oral proof.

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(4) Authority to Make a Contract Under Seal Must Be Given Under Seal

STORY CASE

Harold Capper, living in Chicago, wrote a letter to Fred Whiffen in Dayton, Ohio, authorizing him to sell an acre of land belonging to Capper and situated in Dayton. Whiffen thereupon found a buyer and executed a deed to the buyer, signing Capper's name thereto, and his own as agent. Later Capper refused to have his tenant evacuate the land, and the buyer from Whiffen brought action to compel Capper to give up possession. Capper put in a defense to the effect that the letter to Whiffen merely gave the latter an authority to make a contract for selling the land, and not an authority to make a deed for it, because a deed must be under seal, and therefore the authority to make a deed must be under seal. Is this a correct defense?

RULING COURT CASE

Ingram vs. Little, Volume 58 *American Decisions, Page* 549.

In this case it appears that the owner of certain land made out a deed to the same, leaving blank the person to whom it was to be conveyed, and the amount of the purchase price.

In this condition it was given to Anderson, with parol direction to find a purchaser and fill in the blanks with the name of the purchaser, and the amount which might be agreed upon. Finding a purchaser, the agent filled in the blanks mentioned above, and delivered it to the purchaser as the deed of the owner.

In an action of ejectment the validity of this deed was called into question. Upon this point the Court held that it was not an operative deed.

The Court said in part, Mr. Justice Nisbet delivering the opinion: "The deed in this case, before its completion and delivery, was inoperative, because made to no person. We say it could not become a valid deed by filling in the blanks the name of Little as purchaser, by Anderson, in the absence of the owner, because Anderson had no authority under seal to act. The deed was void."

RULING LAW

Story Case Answer

At common law it is a well known rule that authority to execute a sealed instrument by an agent had to be conferred by an instrument under seal. The rule has always been regarded as technical. Accordingly, many states have abolished the distinction between sealed and unsealed instruments, thus doing away with the rule just referred to. So unless changed by statute,

the agent's authority to make a deed or conveyance of land, must be by deed under seal. But an agent need not have sealed authority to make a contract for the sale of land, because a contract for the sale of land need not be sealed.

NOTE: We learned under the previous title the Statute of Frauds in most states requires a contract for the sale of land to be in writing. Therefore an agency to so contract must be in writing to be enforcible in the courts. A conveyance or deed must be under seal, and therefore authority to make a deed must be under seal.

In the Story Case given above, many courts will say that since Whiffen had the authority to make a contract to sell the land, although not the authority to convey it himself, the deed which he made will be considered as a contract to sell and hence the principal will be compelled to execute a deed himself in specific performance of that contract.

Summary:

(1) The authority given to an agent usually need not be in writing.

(2) The authority to execute a written contract usually need not be in writing.

(3) The authority to execute a contract required to be in writing by the Statute of Frauds must be in writing. This includes:

    (a) An agency contract whereby the agent agrees to work over a period extending more than a year from the day of making the contract.

(b) All contracts having reference to the sale of land.

(4) Authority to convey land—make a deed—must be under seal.

B. There Must Be Contractual Elements Present

(1) There Must Be Mutual Assent

STORY CASE

Edward Howe, in Chicago, wrote a letter to Edward Snow, in Detroit, stating that he thereby appointed Snow his agent in the latter city to sell the Howe Automobile Pumps, at 15 per cent commission on all pumps sold, the agency to continue for one year. No correspondence had passed between the parties in the matter previous to this letter, and Snow did not reply to this letter prior to the receipt of another letter from Howe, stating that for reasons which he desired not to give, the offer made in his first letter was recalled. Snow had not made any effort to sell pumps up to this time, but nevertheless he brought suit on a contract which he alleged existed giving him authority to sell pumps. Can Snow recover?

RULING COURT CASE

Scott vs. Harvey, Volume 9 *Illinois Appellate Court Reports, at Page* 19.

In this case it appears that Scott was the owner of a horse. He was moving from Illinois to Kansas, and, not being able to take the horse with him, he left it in care of Harvey until it could be disposed of. After moving to Kansas, Scott met one Hampton of Illinois and asked him if he would take the horse from Harvey

and sell it, in case Scott should write him to do so. Hampton was perfectly willing to effect the sale.

Soon after his return to Illinois he received a letter from Scott directing him to sell the horse. In accordance with the direction, and without writing to Scott that he accepted, Hampton caused the horse to be sold at public auction. After paying Harvey the amount due him for the care of the horse during the time it was in his possession, the balance of the money was sent to Scott. For some reason Scott was not satisfied with the sale. He returned the money to Hampton, and sued Harvey, claiming that Harvey had no right to deliver the horse to a public auctioneer at the request of Hampton, since Hampton had not been given such authority.

Justice Higbee gave the opinion.

The Court held that Hampton was duly appointed agent, upon receipt of the letter. It was not necessary that he should have sent back his acceptance. When he assumed the responsibility of selling the horse, this was sufficient manifestation of his acceptance of the proposal made by Scott. Judgment was given for the defendant.

RULING LAW

Story Case Answer

So far as actual agency is concerned, mutual consent is necessary to the creation of the relation This means that the one who desires to have something done must choose some person to do it, and the person chosen must be willing to do the act, and do it for that particular person, and he must manifest that willingness. No notice need be given to the agent, however, to create the relation, but upon learning of his appoint-

ment, he may refuse to act, or, as is generally said, may disclaim the agency.

In the Story Case, no contract ever existed by which Howe was bound to permit Snow to act as his agent. Howe had merely made a proposal to Snow, and the latter had never manifested any intention to accept this proposal or offer. Snow cannot recover.

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(2) There Must Be Consideration

STORY CASE

Robert Lingle said to William Camp: "I know of an excellent automobile worth $1,000, which I can buy for you for $800." Camp answered: "Well, I rely on your judgment, and I want a car, so I will appoint you my agent to buy the one you have in mind. Perhaps some day I can return the favor." Lingle replied that he would buy the car. A week later Camp asked Lingle if the car had been purchased. Lingle replied that it had not been bought, and that he did not have the time to look after the matter. Camp did not get the car, and brought suit against Lingle on an alleged contract for failure to make the purchase. Can Camp recover?

RULING COURT CASE

Thorne vs. Deas, Volume 4 *Johnson's Reports, New York, Page* 84.

Thorne and Deas were joint owners of a brig called the Sea Nymph. The brig sailed on a voyage to a point in North Carolina, and was to proceed from that place to Europe or the West Indies. On the day the vessel sailed, Thorne and Deas had a conversation rel-

ative to insuring the vessel. Deas thereupon said that he would insure it immediately. However, he did nothing toward effecting any insurance, and the brig set out upon its voyage. In a storm, the vessel and its cargo went down.

This was an action brought against Deas, seeking to hold him for the damages resulting from his failure to do as he promised. His defense was that his undertaking was without consideration and therefore was not binding upon him.

Decision: An agreement to do something for another is not binding unless there is some consideration for that agreement. Therefore an agreement to act as agent for another, or to do some act as an agent for another, imposes no liability upon the agent so long as he does nothing. He is under no obligation to do anything. But if he enters upon the duties of the agency and does them negligently, then he may be held as if his original undertaking had been supported by a consideration. Deas' promise to insure this boat was a promise unsupported by a consideration. He was under no obligation to do anything. He did nothing, and could not be held responsible for the damages resulting from his doing nothing.

Mr. Chief Justice Kent, who delivered the opinion of the court, said in part: "The chief objection raised to the right of recovery in this case, is the want of consideration for the promise. The offer on the part of Deas, to cause insurance to be effected was perfectly voluntary. If the party who makes this engagement, enters upon the execution of the business, and does it amiss, through the want of due care, by which damages ensue to the other party, an action will lie for

misfeasance. But Deas never entered upon the execution of his undertaking and the action is for the non-feasance. * * * *

"A short review of the leading cases will show, that, by the common law, a mandatory, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do and does it amiss. In other words, he is responsible for a misfeasance, but not for a non-feasance, even though special damages be claimed."

Judgment was given for Deas.

RULING LAW

Story Case Answer

Consideration: If the agreement is executory, i. e. one which contemplates future performance, there must be some consideration to make it binding. That is to say, if one person agrees without consideration to act for another, and then refuses to act, the other has no remedy. But if the person gratuitously acts for another and performs the services contemplated, the mere fact that he acted without consideration does not excuse him from duties and liabilities incidental to the agency.

In the Story Case, Camp does not have a cause of action against Lingle because a binding contract was not made. The statement "Perhaps some day I can return the favor" shows that no consideration passes from Camp to Lingle and therefore Camp cannot recover on Lingle's promise.

2. The Appointment May Be by Act of the Principal Subsequent to the Agent's Act With Third Person. This Is Ratification

A. Ratification May Be Expressed or Implied

STORY CASE

James Newby was the traveling Secretary of Alonzo Benson. While in Boston, Newby saw a rare old piece of furniture which he purchased in the name of his principal, thinking that Benson would like the furniture and keep it after seeing what it was like. The furniture was shipped to Benson's home, and he had it unpacked and placed in his residence. A month later the dealer attempted to collect for the sale, but Benson refused to pay, saying that Newby had no authority to make the purchase, and that the dealer could have possession of the property. Can the dealer compel Benson to pay?

RULING COURT CASE

Crosswait vs. Montgomery Volume 12 *of the Lawyers' Reports Annotated at Page* 140.

This was an action upon a promissory note, for the sum of three thousand dollars, payable to J. A. Montgomery, signed by Percy R. Smith & Co. The note was indorsed by Montgomery to Crosswait, who brings this action against Montgomery as an indorser. Montgomery, in defense, contended that after he had indorsed it, the note had been materially changed. The facts showed that the note was originally signed by Percy R. Smith alone, and that after his endorsement "And Co." had been added without his authority. Crosswait in reply to this defense contended that at various times before and after maturity of the note Montgom-

ery, with full knowledge of the alteration, ratified the signature by promising to pay.

Justice McClellan delivered the opinion.

In view of the fact that the defendant was shown to have known of the alteration, and not objecting thereto, promised to pay, the court was of the opinion that he ratified the note as altered. What a person may authorize in the beginning he may ratify subsequently, by express word or by conduct, provided rights of third persons have not intervened which would make it unjust for him to ratify subsequently.

RULING LAW

Story Case Answer

We have seen heretofore that if a person acts for another without due authority, or exceeds the authority granted him, he is himself responsible. But if the principal, subsequent to the agent's act, expresses his approval, either verbally or in writing, or by his conduct in accepting the benefits of the act, he will in general be bound to the same extent as if he had given the agent full authority, before the act. Such acceptance of an agent's act, subsequent to its execution is called ratification; stated legally, then, subsequent ratification is equivalent to precedent authority.

When the principal learns of the act or acts done by the agent, he cannot by ratification accept the benefits which would be conferred upon him, without subjecting himself to the consequent liabilities. If he accepts the benefits he is subject to the liabilities.

In the Story Case, the dealer can compel Benson to pay, because Benson has ratified the act of Newby in purchasing the furniture. This ratification was by

conduct, in that Benson allowed the furniture to be unpacked at his home, and to be used for a month, without objection.

B. The Elements Essential to Ratification Are Those Which Would Have Been Necessary Had There Been Authorization

(1) The Act Must Have Been One That Could Have Been Authorized

STORY CASE

Clyde Rucker was in the employ of a real estate agent by the name of R. A. James. Rucker was in need of money, so he made out a note, signed by himself, carried it to the First National Bank and requested that they discount it. The bank refused to do so unless he would get some other person to sign the note with him. Clyde Rucker went away and forged the name of R. A. James to the instrument, as a joint maker. He carried the note back, and the bank gave him money on it. A few days later Mr. James was in the bank, and he was asked about the note, looked at the instrument and said it was a forgery, but preferred to stand by it rather than have the young man prosecuted. When the note came due Rucker was unable, and James refused, to pay it. Suit was brought against Mr. James.

Under the foregoing circumstances what should be the decision of the Court?

RULING COURT CASE

Workman vs. Wright, Volume 14 *Ohio Reports, Page* 647.

A third person, whose name was not mentioned in the case, forged the name of Wright to a promissory

note. It was then indorsed to Workman, who paid full value therefor, and had no knowledge or means of knowing, that the maker's signature was forged. After the forgery was discovered, Wright told Workman that he would pay the note when it fell due notwithstanding the forgery. When that time came, however, Wright had changed his mind and refused to pay the note. Workman thereupon brought suit upon the note, alleging that, although it was a forged instrument in the beginning, Wright ratified the unauthorized act of the third person by his promise to pay.

Wright contended that the forgery was a void act and therefore could not be ratified. He contended that he could not have authorized the forgery, although he might have authorized the signing of the note.

Decision: The court was of the opinion that the act of the third person in the first instance was absolutely void, and such being the case, was incapable of being ratified by any subsequent act, conduct or promise of the person whose name was forged.

Mr. Justice Wright, in the course of his opinion said: "It is said that a distinction exists between the classes of cases to which principles of ratification apply. Where the original act was merely voidable in its nature, the principal may ratify the act of his agent, although it was unauthorized. But where that act was void, as in the case of a forgery, it is said that no ratification can be made."

Judgment was given for Wright.

RULING LAW

Story Case Answer

The doctrine of ratification presupposes that the act ratified is valid except for the lack of authority on the

part of the agent. In this sense the act is merely voidable. When the principal approves the act, the defect in the act caused by lack of authority is removed, and the act becomes binding. But if the act is defective for reasons other than lack of authority on the part of the agent, obviously the approval of the principal can only remove the lack of authority, and cannot remove other defects over which he has no control. The authorities generally say that a forgery is such an act. It is void in itself, aside from lack of authority. So it cannot be ratified by the principal. In the Story Case, the act of Rucker in signing the note was void so far as Mr. James was concerned, and therefore cannot be ratified. James was not liable on the ratification.

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(2) The One Who Ratifies Must Have Been in Existence When the Contract Was Made

STORY CASE

Edward Ely was informed that John Stone was about to be appointed receiver of a certain milling company which had gone into bankruptcy. Ely believed that anything he would do in the name of Stone, receiver, would be acquiesced in later, if the act done was for the apparent benefit of the bankrupt concern. Ely, therefore, purchased a thousand bushels of wheat for Stone, receiver, on the strength of his belief that wheat would go up in value within a few days. A week later Stone was appointed receiver, and he ratified Ely's contract. Wheat, in the mean time had gone up in price and the seller refused to deliver, saying that no contract existed between himself and Stone, since Stone had not had the authority to make the contract at the time it was made. Is this a good defense?

RULING COURT CASE

Krumdick vs. White.

William Krumdick, during his last illness, executed a certain instrument in writing to Edmonds, authorizing him, as agent, to sell certain horses and wagons. After the death of Krumdick, Edmonds procured and sold the property in question to White. In pursuance of the sale, possession thereof was delivered to White. This is an action by Jennie Krumdick, administratrix of William, to recover the possession of the property in question and damages for its detention. She based her claim upon the fact that the death of William terminated the authority of Edmonds, since it was not coupled with an interest. If his agency was terminated and his authority gone, the transaction obviously passed no title to the property to White. White replied to this by claiming that she, as administratrix, ratified the sale by accepting a portion of the money when distributed by Edmonds. But, how can that be? At the time the sale was made and at the time Mrs. Krumdick made the alleged ratification she was not administratrix. There was, in fact, no one who could have authorized such a sale and, consequently, subsequent to the sale, it could not be ratified.

RULING LAW

Story Case Answer

One who ratifies must have been in existence when the contract was made. A person cannot ratify an act unless such person was in existence at the time the act was done, and had the capacity to act at that time. The case of *Krumdick vs. White* is a very neat, but somewhat technical, illustration of this point. When the

agent sold the property in question, the owner and his former principal was dead. At the same time the administratrix was not in existence. So it was an act which could not, under any circumstances, have been ratified. This same point is also illustrated in cases where a person purports to do an act on behalf of a corporation not yet formed. When the corporation comes into existence, it may, acting through its directors, attempt to ratify the act, but it cannot do so, for there was no such principal in existence when the act was done.

In the Story Case, there could be no ratification because Stone, as receiver, was not in existence at the time the act was done. So the defense by the seller would be good.

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(3) The Act Must Have Been Performed as Agent for the Principal

STORY CASE

Henry Watson, a salesman for Charles Knowlin, purchased a lot of goods in his (Watson's) own name, intending secretly to sell them to another if the occasion permitted. He later became frightened at his own conduct and informed Knowlin that he had purchased this lot of goods at a reduced price for Knowlin. Knowlin wrote the vendor of the goods to ship them to Knowlin's warehouse. The vendor, however, had determined to keep the goods if there was a legal way to do this. Knowlin brought suit on this contract, which he alleged was made by his agent and ratified. What are Knowlin's rights?

RULING COURT CASE

Durant vs. Keightly, Moxster & Co., Volume 1 *British Ruling Cases* 351, *Same Case, Volume,* 1901 *Appeal Cases,* 240.

Roberts, a corn merchant residing at Wakefield, was authorized by Keightly, Moxster & Company, to buy wheat jointly for himself and them at a certain price, within a certain time. Roberts failed to make the purchase at the authorized price by the 11th of May, which was the last day on which he was authorized to buy. Two days later, without any authority from Keightly and Company, he made a contract with Durant to buy wheat at a higher price. The contract was made in the name of Roberts, although he, at the time, intended that it should be for the benefit of Keightly and Company and himself jointly. However, not a word was said to Durant that it was being bought for Keightly and Company. So far as they knew and had reason to believe, Roberts was buying the wheat on his own account and solely for himself. The following day, Roberts informed Keightly and Company what he had done, they approved the transaction and said that they would stand by the transaction as they had originally agreed, even though it was done without their authority. Durant, on the day set for performance, tendered the wheat; Keightly and Company, and Roberts as well refused to accept it. Durant then discovered that Roberts secretly intended to purchase it for Keightly and Company, and that the latter had approved the transaction. They thereupon sued Keightly and Company for the resulting damages.

Keightly and Company contended that they could not ratify the contract because Roberts was not acting

as agent when he made the transaction; but that he was acting for himself, and that his secret intention is immaterial.

Decision: A person is not permitted to ratify an act which was not done by one as agent. The agent must disclose to the third person that he is acting as agent. Otherwise, no one can thereafter take advantage of that contract by ratification. In this case, Roberts did not acquaint Durant with the fact that he was acting or intended to act for Keightly and Company. Consequently, Keightly and Company is not in a position to ratify the act. Any attempt to do so is futile.

Lord Shand said in part: "The question which arises on this state of the facts is whether, where a person, who has avowedly made a contract for himself (1) without a suggestion that he is acting to any extent for another (an undisclosed principal), and (2) without any authority to act for another, can effectually bind a third party as principal, or as a joint obligant with himself, to .the person with whom he contracts, by the fact that in his own mind merely he made a contract in the hope and expectation that his contract would be ratified or shared by the person as to whom he entertained that hope and expectation. I am clearly of opinion, with all respect to the majority of the court of appeals, that he cannot. The only contract actually made is by the person himself and for himself, and it seems to me to be conclusive against the argument for Durant, that if their reasoning were sound, it would be in his power, on an averment of what was passing in his own mind, to make the contract afterwards either one for himself only, as in fact it was, or one affecting or binding on another,

as a contracting party, even although he had no authority for this. The result would be to give one of two contracting parties, in his option, merely from what was passing in his own mind and not disclosed, the power of saying the contract was his alone, or a contract in which others were bound with him. That, I think, he certainly cannot do in any case where he had no authority, when he made the contract, to bind anyone but himself.

The House of Lords gave judgment for Keightly, Moxster & Company.

RULING LAW

Story Case Answer

We have just seen that the principal cannot ratify an act unless he was in existence at the time the act was done. Further, a person may not ratify an act, unless that act was intended for the benefit of the person ratifying it, when it was done. That is to say, if A goes out and contracts to buy cotton for B, or for himself, C, who happens along, cannot ratify the contract and make it his own. This same rule applies even though the agent intended that it should be for a particular person, unless, at the time, he informs the third person, with whom he deals, that he is acting as agent. This doctrine was firmly established in the case of *Durant vs. Keightly, Moxster & Company,* which was decided by the House of Lords of England, after a most careful consideration of the principals involved.

In the Story Case, Knowlin could not compel a delivery of the goods because Watson did not make the contract for him or as his agent. To enable Knowlin to receive the benefit of the contract it would have been

necessary for Watson to have made the contract for Knowlin. At least he must have informed the third person that he was acting, not for himself but as an agent for another.

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(4) The Principal Must Have Full Knowledge at the Time of the Ratification

STORY CASE

George Thompson, the purchasing agent of the Gammon Hardware Company, went beyond the scope of his authority in purchasing a lot of automobiles. He explained to his principal the nature of the purchase, and stated, among other things, that the automobiles carried a certain make of carburetor. This information was given in good faith, but the agent was mistaken as to this point. In reliance on what the agent had said, the Gammon Company wrote the automobile manufacturer, stating when and where the cars should be shipped. A few days later, the truth was learned as to the carburetors, and the hardware company wrote another letter, stating that the automobiles would not be accepted. The automobile manufacturers thereupon brought suit for damages against the hardware company. What are the rights of the parties?

RULING COURT CASE

Bank of Owensboro vs. Western Bank, Volume 26 *Lawyers' Reports Annotated at Page* 211.

The Bank of Owensboro authorized the Western Bank to make an investment of $5,000 for them in good notes. In accordance therewith, the Western Bank made a loan to one Atwood, secured by stock of the Bank of Louisville. The Western Bank, however, ex-

ceeded its authority in making the loan in this manner because the Bank of Louisville had a lien on this stock for unpaid subscription. The Western Bank explained this to the Bank of Owensboro, but advised the Bank of Owensboro to ratify the act because the Bank of Louisville had promised to release this lien.

When the notes were due, the Bank of Owensboro could not collect from Atwood because he had become insolvent. Also, the Bank of Louisville refused to relinquish its lien. Therefore, the Bank of Owensboro brought this action against the Western Bank for negligence in making the loan contrary to instructions. The Western Bank defended on the ground that its act in making the loan had been ratified by the Bank of Owensboro.

Justice Woodbury rendered the opinion: "If the principal acquiesces in the agent's act with a full knowledge of all the facts, then this amounts to a ratification and the agent is released from liability to the principal for doing the unauthorized act. There was no ratification in this case because the Bank of Owensboro did not know all the facts; it did not know that the Bank of Louisville would assert its lien. Therefore, the Western Bank is liable for its unauthorized act."

Judgment is given for the Bank of Owensboro for its losses.

RULING LAW

Story Case Answer

Before an alleged ratification is binding upon the principal he must have been actually acquainted with all the material facts concerning the transaction which he is ratifying. This means that he must know the actual facts, and not merely the facts as the agent

thought them to be. If the agent himself is mistaken about the material facts, ratification based upon these facts by the principal is not binding upon him.

In the Story Case, the hardware company would not be liable for damages because it did not ratify with knowledge of all the material facts; hence the ratification was not binding upon it.

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(5) Ratification Must Be of the Whole Act

STORY CASE

Clarence Burnham, the agent of the Western Fuel Company, bought for that company four cars of nut coal and two cars of lump coal. This purchase was made without the authority of the company. The lump coal arrived at the fuel company's yards, and was unloaded by its authorized workmen. Two days later the nut coal arrived, and not being of the grade the company desired, it refused to accept these cars, saying that Burnham had no authority to contract for this coal. The company which sold the coal thereupon brought suit for damages. What are its rights?

RULING COURT CASE

Elberts vs. Silover, Volume 44 *Michigan Reports, Page* 519.

An itinerant book agent wandered into the office of a Michigan Justice of the Peace. He was soliciting orders for a local history published by his principal, Elberts. The price of the book was $10. The Justice of the Peace thought it too high but the agent was insistent. Finally the generous justice said that he would take a set upon condition that the fees of his office until the time of delivery should constitute the

purchase price. The book agent, ignorant of the limited jurisdiction of the justice, gladly accepted. The agent carried a small order book in which buyers signed their names. At the top and bottom of each page in conspicuous print was the statement that the price of the book was $10, and that no agent had authority to reduce the price. In this book the Justice of the Peace signed his name, but with the condition above referred to. Elberts brings this action for the recovery of the $10. The Justice of the Peace brought into court $4.27, as the amount of fees collected in the meanwhile and made a tender thereof to Elberts.

Justice Cooley delivered the opinion:

The plaintiff cannot recover. It is clear that the agent had no authority whatsoever to make the particular contract which he attempted to make with the Justice of the Peace. Authority to do this was expressly denied him, and when the defendant signed his name to the book he expressly said he would not give $10 for it. Under these conditions there was no authorized contract at all.

"When the plaintiffs discovered what the agent had done," Justice Cooley speaking, "two courses were open to them, to ratify his contract, or to repudiate it. If they ratified it, they must accept what he agreed to give. If they repudiated it, they must decline to deliver the book under it. But they cannot ratify it so far as it favors them, and repudiate so far as it does not accord with their interests. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by the selection of stipulations to which separately he has never assented." Therefore, the Justice of the Peace is liable only for the fees he

received, and which were tendered in court. The whole contract is ratified and not merely the part beneficial to the principal.

RULING LAW

Story Case Answer

When once the principal has in his possession all the material facts concerning a transaction, and deliberately ratifies that transaction, it is wholly binding upon him, both as to the benefits and burdens. A principal cannot ratify that part of a transaction which is beneficial and repudiate that which is not. If the principal's agent sells the principal's horse and guarantees the soundness of the horse, the principal cannot accept the sale unless he is willing to stand by the warranty of soundness.

In the Story Case, the company selling the coal can recover because the contract was entire for both kinds of coal. The Western Fuel Company could not therefore accept a portion of the coal and refuse to accept the remainder, it must ratify the contract of the agent as to the whole, and cannot ratify as to part and repudiate as to part.

C. Ratification in the Manner of Previous Authorization

(1) Ratification Must Be in the Form Required for Previous Authorization

STORY CASE

John Anderson purported to act as agent for Lea Johnson in making a contract under seal with Joseph Smith for the sale of land belonging to Johnson. Anderson did not have authority to act, but when Johnson learned what Anderson had done, Johnson in-

formed Smith that the land would be sold in accordance with the contract under seal. Later, Johnson refused to carry out the contract. What are Smith's rights?

RULING COURT CASE

Stetson vs. Patten, Volume 2 *Greenleaf, Page* 358; *also Volume* 11 *American Decisions, Page* 111.

One Simson Stetson, purporting to act for Amasa Stetson, drew up an agreement under seal, in the name of Amasa Stetson, with Patten, by which the latter agreed to make certain improvements upon the land of Amasa Stetson. Patten failed, or refused, to perform under the agreement. This action was then brought against him. Patten contended that there was no binding agreement between them, because Simson Stetson had no authority to execute an agreement under seal. To this Amasa Stetson replied that after it was done, she orally ratified it.

Justice Mellen rendered the opinion:

A ratification must be in form required by previous authorization. The Court said in part: "With respect to these facts, they cannot amount to anything more than ratification made by parol, and such ratification could not be more availing than a parol authority given before the instrument was signed, which, as we have seen, is of no importance."

RULING LAW

Story Case Answer

It has been pointed out that when a principal ratifies an act done without authority for his benefit, it has, in general, the same effect as authority given by him to the agent before the act was done. In other

words, subsequent ratification is equivalent to precedent authority. From this it naturally follows that the same formality, and the same requirements are necessary to constitute a valid ratification as would have been necessary to confer the authority before the act was done. An instrument under seal is required in order to ratify the making of a sealed contract, but writing is not required to ratify a contract in writing, unless the Statute of Frauds required that the latter be in writing.

In the Story Case, the ratification was not under seal and was not sufficient. For Johnson to have been bound he should have ratified that act of Anderson by an instrument under seal.

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(2) Ratification May Be Express

STORY CASE

Harry Simpson, the chauffeur of Frank Bond, without authority from the latter, agreed with John Stone to sell him a number of tires belonging to Bond. When Bond learned of this contract of sale, he said: "Well, I suppose I should not object this time, but, hereafter, I shall rule with a stronger hand." Later, Bond refused to deliver the tires. Stone thereupon brought suit alleging that Bond expressly ratified the contract made by Simpson. Was there an express ratification?

RULING COURT CASE

Bank of Utica vs. Ballou, Volume 49 *New York Reports,* 155.

One Shearman, being in need of money, drew up and signed three promissory notes which Ballou signed

by way of accommodation. The notes came into the hands of the Bank of Utica, which brings this action against Shearman and Ballou. Ballou alone appeared, and contended that his liability as accommodation maker was barred by lapse of time, six years. To this the Bank of Utica replied that three payments of interest had been made by Shearman, purporting to be made for Ballou, the accommodation party, within six years of the commencement of the action. The bank claimed that it showed to Ballou this receipt given to Shearman acknowledging payment by Shearman on behalf of Ballou, to which Ballou assented.

Justice Rapallo delivered the opinion of the Court, which held that this was an express ratification of the act of Shearman. The Court said in part: "The payment was shown to have been made to the plaintiff by Shearman, the maker of the notes, in the name and behalf of the defendant, Ballou, taking a receipt at the time as for money paid by the defendant by the hand of Shearman. It is not disputed that a payment made by an authorized agent would be effectual to take a case out of the statute, and it is equally clear that Shearman, though the principal debtor on the notes, might act as such agent. An express ratification is relied on. Unless there is some reason why a transaction of this description should be an exception to the general rule, that a subsequent ratification is equivalent to a previous authority, it is impossible to say that the confirmation by the defendant, Ballou, of Shearman's act, with full knowledge of what Shearman had done, did not render it binding upon him, amounting to an express ratification."

Judgment is given for the plaintiff.

RULING LAW

Story Case Answer

The ratification may be expressly made, as when the principal, with full knowledge of all the material facts concerning a given transaction, states that he accepts the transaction completely. This express ratification may be oral or in writing, depending upon what requirements would have been necessary to confer the authority previous to the transaction.

In the Story Case, there would be an express ratification and Bond would be liable on the contract made by Simpson. Bond's words, while not absolutely unequivocal, would be construed as being an absolute acceptance of the contract and a ratification of the act of Simpson.

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(3) Ratification May Be Implied

STORY CASE

Arthur Sentz, an accountant employed by Howard Noble, a grain dealer, sold a thousand bushels of wheat for the latter without having authority to do the act. Noble learned of the deal shortly thereafter, when wheat had decreased in value. He said nothing about the transaction, and he made no objection when the bookkeeper, who usually made out the transfer sheets, recorded this sale in the usual course of business. A few days later the man who bought of Sentz demanded his wheat. In the meantime the price had gone up and Noble refused to deliver the grain on the ground that Sentz had no authority to act. Is Noble liable for failing to deliver the grain?

RULING COURT CASE

Ehrmantraut vs. Robinson et als, Volume 52 *Minnesota Reports, Page* 333; *also Volume* 54 *Northwestern Reporter,* 188.

Hervin and Wilson were members of an unincorporated benevolent club. Robinson and Larson, also members, acted as trustees and agents for the organization. Without any authority they rented a hall from the plaintiff for five years at an annual rent of $300. The organization went into the hall knowing that their right to occupy the same depended upon some contract made by Robinson and Larson with the owner. But they did not know what the terms were, and it was never discussed by them as a part of the business of the club.

After the expiration of a year the organization disbanded. The owner of the hall brought this action to recover damages for breach of contract. It was contended by Hervin and Wilson that they were not liable because Robinson and Larson acted without authority.

Justice Mitchell delivered the opinion:

Since this was a benevolent club, the members were not partners. Accordingly the liability of each must depend upon whether he authorized the act done, or subsequently ratified it. The Court was of the opinion that Hervin and Wilson, by their conduct and acceptance of the benefits of the contract impliedly ratified the unauthorized contract of Robinson and Larson. The Court said in part: "Where, as in the present case, the defendants, Hervin and Wilson, had notice that an authorized contract had been made in their behalf for the use of these premises, it was their duty, before accepting its benefits, to ascertain what the

terms of that contract were. By going into possession and enjoying the use of the premises, without any attempt to ascertain the terms of the lease under which they entered, they must be held to have deliberately intended to take the risk of ratifying upon such knowledge as they had."

RULING LAW

Story Case Answer

Ratification may also be implied from circumstances or from the conduct of the principal. Whether the principal has ratified is primarily a question of intention. Various circumstances and conduct on his part, though not conclusively establishing, are nevertheless evidence of an intent to ratify. Ratification may be implied from the fact that the principal has offered to perform the contract or from the fact that he insists upon the other party performing. If he accepts any benefits whatsoever from a given transaction, a ratification will generally be implied, provided he knew all the material facts in respect thereto. He is generally held to have ratified in case he brings a suit upon, or utilizes the transaction as a defense. If the unauthorized act was one which was done in excess of authority by his agent, then his silence after knowledge of the unauthorized act will bind him. In such a case it is the duty of the principal to repudiate the transaction immediately upon learning of it. If, however, a complete stranger purports to act for another, the silence of the latter is only slight evidence of an intention to ratify.

In the Story Case, Noble would be liable for failing to deliver the grain. His conduct in allowing his bookkeeper to make a record of the transaction in the regu-

lar course of business was such as to amount to a ratification.

D. Ratification Places the Parties in the Position Which Would Have Resulted From Previous Authorization

(1) The Principal Cannot Ratify If the Rights of Third Persons Have Intervened

STORY CASE

Mr. J. H. Jones was a ranch owner and a cattle grower. On his ranch he had some ten thousand head of cattle. John Anderson, who worked for him on the ranch, was making a trip to Chicago. Jones told Anderson to ascertain the market conditions and telegraph the same to him as soon as possible, and if they were good he would telegraph him authority to sell on certain terms. On reaching Chicago, Anderson found that the prices were very good, but would likely decline before he could receive authority from Jones to sell. So he contracted to sell six thousand head to be delivered in thirty days. He immediately communicated with Jones as to what he had done. On the day following the transaction in Chicago, Jackson, a judgment debtor of Jones, caused the cattle to be attached in satisfaction of his judgment. The day following the attachment, Jones received Anderson's message, and immediately wired him that he approved the transaction. The Chicago Packing Company, to whom the cattle were sold, brought this action to recover the cattle from the sheriff, who had them in possession under the attachment.

Under the foregoing circumstances what should be the decision of the Court?

RULING COURT CASE

Cook vs. Tullis, Volume 18 *Wallace Reports of the United States Supreme Court, Page* 333.

One Homans was a banker engaged in business in Cincinnati, Ohio. On several occasions he had purchased United States Bonds for one Tullis, which he kept in his possession. On one occasion Tullis permitted Homans to use $20,000 worth of the bonds upon condition that Homans put in place of the bonds, bills receivable to the same amount, as security, and to replace the bonds upon demand. This allotment of bonds was returned in accordance with their agreement. In March, 1869, Homans, without permission or knowledge of Tullis, took out $6,000 in bonds, substituting an equivalent amount in bills receivable. In April of the same year he removed these bills receivable and substituted in their place a note and mortgage for $7,000, by him held on one Hardesty. The note was dated April 17, and was payable 90 days thereafter. When the note fell due, Hardesty dishonored it. Homans turned the note and mortgage over to an attorney with instructions to start suit for the collection of the note. Homans failed on August 26. Then, for the first time, Tullis learned of the unauthorized act of Homans. However, he approved the transaction and directed the attorney to proceed with the suit. Cook and others, trustees in bankruptcy of the estate of Homans filed a bill to set aside the transfer of this note and mortgage by Homans to Tullis on the ground that it was in violation of the bankruptcy act.

Cook contended that no right vested in Tullis to the note and mortgage until he ratified; but that, in the

meantime, the rights of the creditors had intervened, and he was then unable to ratify.

Decision: When one purports to act for another in the name of the latter and without the latter's consent, no rights accrue to the alleged principal until he ratifies. Then, it is said, that his rights relate back to the time when the unauthorized act was done. This is true only in case the rights of third persons have not intervened. In this case, however, the court was of the opinion that no rights of creditors had intervened, and that, therefore, Tullis might ratify what had been done.

Mr. Justice Field, who delivered the opinion of the Court, said in part: "The substitution of the note and mortgage in place of the bonds was approved by the defendant, Tullis, immediately upon being made acquainted with the facts. This approval constituted a ratification of the transaction. The general rule as to the effects of a ratification by one, of the unauthorized act of another, respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except when the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by ratification. In other words, it is essential that the party ratifying should be able, not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. As said in one of the cases cited by counsel: 'The ratification is the first proceeding by which he (the ratifying principal) becomes a party to

the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. Thus, if an individual pretending to be the agent of another should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if between its date and the attempted ratification, he had himself disposed of the property.' "

Judgment was given for Tullis because no rights of creditors were shown to have intervened.

RULING LAW

Story Case Answer

Ratification operates by relation. That is to say, an unauthorized act purporting to be done for a given person imposes no liability, and confers no benefit on that person until he chooses to ratify the act. When he ratifies it, the effect is just the same as if he had previously authorized the act. This general rule is subject to this qualification: An act can not be ratified, if, between the time when the act was done and the time when the assumed principal attempted to ratify, rights of third persons have intervened. The principal must not only be able to have done the act when done, but his ability to do that act must also exist when he attempts to ratify.

Now, in the Story Case, Anderson, without authority, sold the cattle. Between the time when he made the sale and the time when the assumed principal attempted to ratify, a creditor came in and attached the cattle. By that attachment he was invested with certain rights. These rights could not be cut off by the

principal ratifying a previously unauthorized act of an agent.

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(2) Ratification Relieves the Agent

STORY CASE

Edward Davis sold to George Miller an automobile which was the property of Otto Nance. Davis acted without authority in making the sale in the name of Nance, and also in warranting that the machine was good in every respect. When Nance learned of the sale, he ratified, by writing Miller a letter, stating that he expected Miller to make the first payment in accordance with the contract. The automobile did not prove to be as good as Davis, the agent, had warranted it to be, and Miller refused to make any payments. On the contrary, he brought an action against Davis on the contract for breach of warranty. Nance also sued Davis for having made an unauthorized contract, whereby Nance claimed he lost his machine. Is Davis liable in either or both suits?

RULING COURT CASE

Sheffield vs. Ladue, Volume 15 *Minnesota Reports, at Page* 388; *also Volume* 10 *American Reports, at Page* 145.

The defendant, Ladue, was a travelling salesman for Johnson & Company. He had in possession a pair of horses, property of Johnson & Company, with authority to sell or exchange them. In pursuance of this authority, he exchanged them with the plaintiff for a pair of horses belonging to the plaintiff, but agreed to pay a difference to the plaintiff and therefore gave a note, signed by himself as agent for Johnson & Company.

The plaintiff sues Ladue, the agent, who contends that he is no longer liable, since the principal, Johnson & Company, in the meantime ratified the contract, although he was not authorized to give a promissory note in the beginning.

Justice Ripley gave the opinion:

The Court held that the defendant was not liable. The ratification of the act by the principal made the note his own, and the agent was no more liable than had he been authorized in the beginning, because the ratification relates back to the time when the act was done, or the note was signed, as in this case.

RULING LAW

Story Case Answer

When the principal has ratified an unauthorized act of an agent, it is the general rule that the rights and liabilities of all parties concerned are the same as if the agent had been given the authority in the first place. Accordingly, the agent is entitled to his compensation, and he is not longer liable to the third person; but he owes such duties as are incidental to the relation. The rights of third persons are then against the principal and not against the agent. Third persons are liable to the principal and not to the agent. If the third person learns that the agent acted without authority, he may withdraw and escape liability to the principal, if he does so before the principal has ratified. Also, after ratification, the agent is not liable to the principal for having made the contract or done the act, even though a loss occur to the principal, as for instance, where he cannot collect for goods sold by an agent acting originally without authority. Therefore,

in the illustrative case, Davis is not liable to either party.

VI. THE CONTRACT CREATING THE AGENCY IS SUBJECT TO THE USUAL RULES OF CONSTRUCTION

1. Authority Must Be Distinguished From Instruction

STORY CASE

James Worthington was the agent of the Flood Live Stock Company with authority to buy and sell horses. After Worthington had worked for this company some time he was given written instructions not to agree to pay more than $100 a head for horses, and the further statement was added that the company would not accept any horses bought at a larger price. Nevertheless, Worthington made a contract with another dealer, agreeing, in the name of the Flood Company, to pay $120 apiece for five horses. What is the liability of the Flood Company on this contract?

RULING COURT CASE No. 1

Van Santwoord vs. Smith, Volume 79 *Minnesota Reports,* 316.

In this case it appears that the Wood Mowing & Reaping Machine Company, through one of its district agents, appointed and authorized Smith to act as their agent in selling reaping machines. In the contract by which the agency was created, Smith agreed to stand personally liable for all promissory notes taken by him except such as contained a full statement of the real and personal property owned by the purchaser. Van Santwoord, as receiver of the Wood Mowing and Reaping Company, brings this action to recover upon cer-

tain notes, basing the right to recovery upon the fact that the notes did not contain the property statement as agreed upon.

Smith, in his defense, proved that he was unable to get these statements, and had gone to Andrews, the district agent of the company, who orally agreed to dispense with that requirement. In the reply the company admitted that Andrews was their general agent, but said that they had given him oral instructions never to change any terms of any contract except in writing.

Justice Brown delivered the opinion:

Andrews was a general agent and, as such, he had power to act in the usual way for his principal. Limitations upon his general power are not binding upon defendant for he never knew anything about them. The Court said in part: "If the contract, between Smith and Andrews, as originally made, carried on its face, as contended by counsel for the plaintiff, Van Santwoord, notice to defendants that Andrews had no authority to agree to a change or modification of the contract of the nature and effect of this one, he would concur in their contention that the modified contract would not be binding on the principal, and could not be enforced except by showing a ratification; but such notice was not conveyed by the original contract, nor does the evidence show any prohibition or restrictions upon the right of the agent to make changes and modifications in the contract with respect to the subject under consideration. The evidence relied on to show want of authority, is found in the testimony of Andrews, himself, to the effect that he was instructed 'not to make oral contracts with agents.' These instructions were

not communicated to the defendant, by the original contract or otherwise, and defendant is not bound thereby. The principal may impose upon the authority of his agent as many limitations and restrictions as he thinks best, and these limitations and restrictions are binding upon third persons, if they have notice of them, or might with reasonable diligence have ascertained them."

RULING COURT CASE No. 2

Farmers' and Mechanics' Bank vs. Butchers' and Drovers' Bank, Volume 16 *New York Reports, Page* 125.

In this case it appears that a depositor of the Butchers' bank entered into a fraudulent agreement with the teller of the bank, pursuant to which agreement the teller, in violation of his instructions and duty, certified five checks as "9,000", although this depositor had no money at all in the bank.

These checks were negotiated and came into the hands of the Farmers' bank, who paid value for them and had no notice at all of the fraudulent transaction made between the depositor and the teller of the Butchers' bank. They bring this action. The defendants contend that they should not be held liable for the reason that they told their agent, the teller, never to certify a check when there was no money on deposit in favor of the maker, sufficient to cover the amount.

Justice Selden gave the decision:

The Butchers' bank is liable nevertheless. These instructions were not brought to the notice of the plaintiff. The facts, concerning which the instructions were given, were within the peculiar knowledge of the defendant, and third persons are compelled to rely

upon the honesty of the agents representing the defendant. The Court said in part: "This conclusion—as stated in the decision—is in no respect in conflict with that doctrine of the law of agency which makes it the duty of all persons dealing with a special agent to ascertain the extent of his powers. It is conceded that every one taking the check in question would be presumed to know that the teller had no authority to certify without funds, but this knowledge alone would not apprise him of the fact that the certificate was defective and unauthorized. To discover this he must not only have notice of the limitations upon the powers of the teller, but of the extrinsic fact that the bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power and facts entirely extraneous upon which the right to exercise the authority conferred, may depend. One who deals with an agent has no right to confide in the representation of the agent as to the extent of the powers. If, therefore, a person, knowing that the bank has no funds of the drawer, should take a certified check upon the representation of the cashier or other officer by whom the certificate was made, that he was authorized to certify without funds, the bank would not be liable; but in regard to the extrinsic fact, whether the bank has funds or not the case is different. That is a fact concerning which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowledge. Were he held bound to ascertain, the teller would be the most direct and reliable source of knowledge, and he already has his

written representation upon the face of the check, and it would be useless to return to the teller. If, therefore, one who deals with an agent can be permitted to rely upon representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would be such a case." Judgment is given against the Butchers' and Drovers' Bank.

RULING LAW

Story Case Answer

It is a simple proposition that a principal is not bound by any act of an agent done without the scope or limits of his authority; but it is indeed very difficult to determine just what is the authority of an agent in a given case. It is obvious that the most comprehensive part of an agent's authority is that which is expressly conferred upon him. But powers expressly conferred are by no means all the authority an agent may exercise. There is also a very important class of powers which an agent may exercise, known as ostensible or apparent powers. This includes all powers usually exercised by agents in a given business; all powers which may be inferred from previous dealings between the parties; and powers which are sanctioned by business customs and usages. These, however, are not binding upon the principal if he limits the agent in the exercise of them, and these limitations are brought home to those whom the agent deals with.

As between the principal and agent such instructions as to the manner of exercising his power, which limit his real or apparent authority, are, of course, binding upon the agent. These instructions are not, however, binding upon third persons who do not know

of them and who have no reason to suspect such secret limitations. Accordingly, secret instructions of this kind are not a part of an agent's authority. If they are made known to persons with whom the agent deals they define and limit his authority. Consequently, it would follow that in the Story Case, the Flood Company would be liable to pay $120 apiece for the horses purchased at that price by their agent, Worthington.

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2. General Authority Includes All the Power to Carry on the Business or Undertaking in Hand

STORY CASE

Andrew Williams was the general manager for Mead & Company, bond brokers, at their Chicago office. Williams was under written instructions never to sign any negotiable notes for the company, without first securing the consent of the president. Nevertheless, within a week after accepting the position, Williams did negotiate notes, signing the name of the company, and made away with the money. When suit was brought on the notes, Mead & Company set up as defense the written instructions given to Williams. It is the usual custom of general managers of bond companies to sign negotiable paper. Is the defense set up by Mead & Company good?

RULING COURT CASE

Montgomery Furniture Co. vs. Hardaway, Volume 101 *Alabama Reports, Page* 69.

Hardaway and Covington, as partners, owned a furniture business in Montgomery. They lived in Baltimore, Maryland, and the business in Montgomery was carried on by a general manager, Burk.

The Montgomery Company had a pair of horses and a wagon which they wished to sell. They offered the outfit to Burk on behalf of his principal for $400. Burk made a counter offer that he would give $300 and a mule worth $65 for the outfit, provided his principal would approve the transaction. Later on, Burk notified the Montgomery Furniture Company that they would take the outfit. A later day was set for delivery. When the day came Burk refused, and a still later day was set. Before that day one horse died, Burk thereupon refused to accept delivery of the team and wagon.

The Montgomery Company sued Hardaway and Covington, Burk's principals. They defended on the ground that the contract was not binding because Burk was without authority. They said that they had expressly denied him the power to bind them by contract, without first getting their approval.

Justice Weinkoop gave the opinion:

Burk was a general agent. General authority naturally goes with this office. The agent's authority as to third persons is what it appears to be, and must be determined by the nature of his business. It is *prima facie* co-extensive with the requirements. Under the circumstances of the case under consideration, it seems fair to conclude that this contract came within the general scope of powers ordinarily exercised by general managers of furniture stores. The Court said in part: "The principal of a special agent is only bound by acts of the agent, which are in accordance with his authority, and a third party is bound at his peril to ascertain the extent of the agent's authority. But a very important distinction is made, and must always be observed in the application of this

rule, between 'special' and 'general' agents. This court has carefully drawn this distinction. As was said in *Wheeler vs. McQuire*—86 *Ala* 402—, and before and since held to the same effect: 'A general agent may exceed his express authority, and the principal nevertheless be bound. The scope and character of the business which he is employed to transact, is, as to third persons, the extent and measure of his authority. When the general agent transacts the business intrusted to him, within the usual and ordinary scope of such business, he acts within the extent of his authority. The principal is bound, provided the party dealing with the agent acts in good faith and is not guilty of negligence, which proximately contributes to his loss.' " In this case Burk was doing what a general manager might be expected to do in buying the horses and therefore his principles are liable on the contract.

RULING LAW

Story Case Answer

General authority includes the power to do everything reasonably necessary for the carrying on of a given business, or for completing a given transaction, or the doing of a given act. Consequently, the scope of general authority will depend upon the nature of the business. However, all known limitations which third persons are led to suspect, are binding upon them, although the agent may have general authority.

In the Story Case, the defense by Mead & Company would not be good. They would be bound because the general manager of a bond brokerage business has apparent authority, from custom and usage, to sign negotiable paper.

3. Special Authority Is the Power Given to Do a Single Act

STORY CASE

Lea Tompkins was appointed an agent by Fred Mechem to sign Mechem's name as surety on a non-negotiable note for Edward Neil. Mechem gave instructions that the note should not be for more than thirty days. Neil persuaded Tompkins to sign a note for sixty days, and the note was given to one Hill, who brought suit against Mechem as surety, upon failure to pay by Neil. Has Mechem a defense?

RULING COURT CASE

Thornton vs. Boyden, Volume 31 *Illinois Reports, Page* 200.

Thornton, being the owner of certain land, conveyed it to one Lee, in trust, to secure the payment of a debt owed by Thornton to Boyden. In this conveyance to Lee, it was provided that in case Thornton should fail to pay the debt by a certain named day, Lee might proceed to sell the premises "at public auction, at the front door of the court house, at the county seat, in Mercer County, for cash in hand, first giving thirty days' notice of the time, place and terms of sale, in one or more of the newspapers printed in the county."

Thornton did not pay the debt by the day named, so it became necessary to make a sale. Lee, pursuant to instructions contained in the conveyance to him, made a proper and complete publication of his intention to sell the land in question. On the day set for the sale, he published in the same paper that it was postponed for five days. At that time, that is, five days later, the

sale was made, and Boyden purchased the same. Thornton then sues Boyden for the recovery of the land, basing his claim upon the fact that Lee exceeded his authority in making the sale.

Justice Breese delivered the opinion:

Here Lee was a special agent for a special purpose, with only limited authority. In order to have bound his principal, he should have acted in strict accordance with his power, but instead he made the sale with only five days' notice, and so it is not binding upon the principal. "The acts of a special agent are not binding on his principal unless they are strictly within his authority."

RULING LAW

Story Case Answer

Special authority is power conferred upon an agent to do a special act, or perform a special mission. Here, as in a case of general authority, the principal is bound if the agent acts within the apparent scope of authority. However, in determining the liability of the principal for acts of a special agent, it is fundamental that the authority must be strictly exercised. A third person who knowingly deals with an agent of this character, must at his peril ascertain the nature and extent of the agent's authority. But, even in respect to special authority, an agent has certain implied and incidental powers, which the principal can limit only when third persons are acquainted with such limitations.

Mechem has a valid defense. Tompkins exceeded his authority and Mechem is not bound as surety.

4. Certain Authority Can Be Delegated

A. Power Can Be Delegated, When That Is Customary

STORY CASE

Andrew McElroy of Boston sent a note for collection to the First National Bank of that city, against a person living in Cambridge, Massachusetts, a town contiguous to Boston. The First National Bank sent the note to a small bank in Cambridge to present to the debtor. This was done by the Cambridge bank, and the debtor paid the amount due. Before the remittance was made by the Cambridge bank it became insolvent, and as a result McElroy never received what was due to him. He brought suit against the Boston bank on the ground that the latter had no authority to delegate its authority to collect. The Boston bank defended on the ground that it had not been careless, and although it could have sent its own collector to Cambridge, it had followed the usual custom in appointing another bank to collect. Is this defense good?

RULING COURT CASE

Appleton Bank vs. McGiloray, 64 *American Decisions* 92.

Upon the trial of this it appeared that McGiloray held two notes payable to himself. He indorsed them in blank and delivered them to an expressman, with directions to collect them in the ordinary way. This carrier did a great deal of collecting for patrons. Sometimes he collected by personally calling upon the debtor; and sometimes by depositing them in a bank for collection. He did not inform McGiloray how he intended to collect the notes, and was not aware whether they knew that he ever collected notes through banks.

However, he deposited the notes with the Appleton Bank for collection. On the following day he was informed that payment had been made, and the proceeds of the two notes was delivered to the carrier, who in turn delivered it to his principal McGiloray. Through some clerical error, these two notes had been entered as paid, when in fact they had not been. The Appleton Bank sues the defendant, claiming to recover money paid under a mistake of fact. The defendant contended that there was no liability because their agent had no authority to delegate his power to collect the notes.

Justice Bigelow delivered the opinion.

Plaintiff is entitled to recover the money so paid although it is the general rule that an agent may not delegate his authority. Where it is customary to do so, it may be done. It is a well established usage for banks to collect. It is their principal business, and in such a case non-delegation of power does not apply.

RULING LAW

Story Case Answer

The authority which an agent exercises is delegated. Now it is a fundamental principle of law that one who exercises delegated power cannot in turn delegate it to some one else. It naturally occurs to one that if the principal consents there is no objection to the creation of a sub-agency. However, if the duties of the agent are purely ministerial, which involve no discretion and no personal skill, then an agent may delegate the doing of them to a sub-agent, unless he has been forbidden to do so by its principal. Therefore, the agent's power can only be delegated if the power is merely ministerial, or if the principal consents. The principal is as-

sumed to consent where delegation is a matter of custom.

In the Story Case, the defense of the Boston bank is good. The bank forwarded this note for collection in the usual course of business to its correspondent. This was an established custom and forms part of the powers of the agent in appointing a sub-agent.

B. Power Can Be Delegated When That Is Implied From the Nature of the Agency

STORY CASE

The Eastern Woolen Company appointed Lew Baker its western manager with offices in Chicago. Among other sub-agents Baker appointed one Briggs as salesman in Missouri, and shipped to the latter a lot of goods. Briggs sold the goods and failed to pay over the money. The company brought suit against Baker for the amount due, on the ground that Baker had no authority to appoint sub-agents. Baker's defense was that authority to appoint sub-agents was given, otherwise he could not cover the territory for his principal. Is this a good defense?

RULING COURT CASE

Dorchester and Milton Bank vs. New England Bank Volume 1 *Cushing's Reports* 177.

The Dorchester and Milton Bank in the State of Massachusetts, having discounted a number of drafts payable in Washington, D. C., transferred them by general indorsement and without specific instructions to the New England Bank in Boston, their general agents for collection. The New England Bank, having no correspondent in Washington, transferred the

drafts by a like general indorsement to the Commonwealth Bank in Boston, which was then and for some time afterwards a bank in good financial condition. The Commonwealth Bank by general indorsement sent the drafts to its correspondent, Bank of Washington, for collection.

At this point the Commonwealth Bank failed. The New England Bank demanded these drafts of the Bank of Washington, before they matured, the latter refused to deliver them up, collected them, and applied the proceeds to a balance due them from the Commonwealth Bank.

The Dorchester Bank sues for damages, alleged to have resulted from the delegation of power by the New England Bank in proceeding to collect the notes. It was contended by the defendant that the very motive of the transaction contemplates the delegation of the power to collect the drafts.

Justice Wilde delivered the opinion.

As a general rule an agent has no right to delegate his authority to a sub-agent, without the assent of his principal, but when, from the nature of the agent, a sub-agent must necessarily be employed, the assent of the principal is implied. This is such a case. Since it appears that the defendant acted in good faith and was guilty of no negligence, he is not liable.

The Court said in part: "It is argued that the employment of the Commonwealth Bank was improper, on the ground that the trust reposed in the defendant was a personal confidence, and also that a delegated authority cannot be delegated. This no doubt is generally true, but when from the nature of the agency, a sub-agent or sub-agents must necessarily be employed,

the assent of the principal is implied. Such was the nature of the agency in this case. It could not have been expected that the defendants would employ one of their own officers to proceed to Washington for collection, and if the defendants employed suitable sub-agents for that purpose, in good faith, they are not liable for the neglect or default of the sub-agents."

RULING LAW

Story Case Answer

If an agent is employed to do an act or perform a mission for another, and the act or mission is of such a nature that it would not be possible for the agent personally to attend to it, he may employ sub-agents to assist him, and this, even though discretion must be exercised in the transaction. In such a case, it is said that the consent of the principal is implied. If A goes to B in Chicago and asks that B collect from C in Toronto, Canada, the very nature of the agency contemplates that B must have a sub-agent. Accordingly, unless B is expressly forbidden, he may employ X of Toronto to assist in making the collection.

In the Story Case, Baker's defense is good. The nature of the agency is such that he could not cover the territory assigned to him without appointing sub-agents to assist him. His authority to appoint sub-agents is assumed from the nature of the agency.

C. Agent Is Liable When He Delegates Without Right

STORY CASE

Steven Miller appointed Victor Taylor as agent to sell brick in the town of Springfield. Taylor had other business and so delegated his power to one Lyon to

sell the brick. Lyon was a capable man, and apparently Taylor was careful in choosing him as sub-agent. Lyon, however, made a mistake in delivering brick to an insolvent corporation and Miller was never paid for his brick. Miller brought suit against Taylor on the ground that Taylor had no authority to appoint a sub-agent and therefore is absolutely liable for the loss. Taylor submitted as defense that his other business compelled him to appoint a sub-agent and that he was careful in making the appointment. What should be the ruling of the Court?

RULING COURT CASE

Hoag vs. Graves, Volume 81 *Michigan Reports, Page* 628.

The evidence in this case showed that Hoag had a claim arising out of a policy of insurance which had been issued by a company in New York. Hoag engaged Graves to collect. They agreed that in case it was collected, Graves should have one-half of the amount, but he was to pay all expense necessary in the collection of it. Hoag was to receive the other one-half.

Graves then engaged a lawyer in New York to see about the matter. This lawyer asked for a power of attorney of Hoag, which was given. He collected $500 and sent it to Graves. The lawyer collected the remaining amount of the claim, but refused to remit any portion of it. Hoag then sued Graves claiming that the lawyer was agent of Graves, and that payment to the lawyer was payment to Graves.

Justice Champlin delivered the opinion.

The circumstances of the case show that the lawyer in New York was not agent of Graves, but agent of Hoag. Accordingly he cannot recover.

The Court in support of its judgment, quoted from Mechem: "If an agent employs a sub-agent for his principal and by his authority, express or implied, then the sub-agent is the agent of the principal and is directly responsible to the principal for his conduct; and if damages result from the conduct of such sub-agent, the agent is only responsible in case he has not exercised due care in the selection of the sub-agent. But if the agent, having undertaken to transact the business of his principal, employs a sub-agent on his own account to assist him in what he has undertaken to do, he does so at his own risk and there is no privity between such sub-agent and the principal. The sub-agent is therefore the agent of the agent only, and is responsible to him for his conduct, while the agent is responsible to the principal for the manner in which the business has been done, whether by himself or his agent. (Mechem On Agency. Sec. 197.)"

RULING LAW

Story Case Answer

If the agent without due care in a proper case selects a sub-agent to assist him in carrying on the business of the principal, this sub-agent is agent of the principal and not of the first agent. By a proper case is meant one in which the agent is expressly authorized to delegate, or when the act involves no discretion, or where such delegation is customary or necessary from the nature of the case. On the other hand, if the agent negligently employs a sub-agent even in a proper case, he is answerable to his principal for the default or mis-

conduct of the sub-agent. Further, if he employs a sub-agent when he as agent is not permitted to delegate his authority, he does so at his peril. No amount of care in selection will relieve him from liability to this principal for the default or misconduct of the sub-agent.

In the Story Case, the ruling of the Court should be that Taylor's defense would be of no effect. He would be liable absolutely for the act of Lyon, for the reason that he had no authority, either express or implied, to appoint a sub-agent.

VII. CERTAIN DUTIES AND LIABILITIES ARISE OUT OF THE RELATION OF AGENCY

1. The Agent Owes Certain Duties to the Principal

A. The Agent Must Exercise Good Faith

STORY CASE

Joseph Hamlin for many years had been lessee of a theater, and had built up a fine theatrical business. Robert Davis was his confidential agent and business manager. Just previous to the time when Hamlin's lease was about to expire, Davis went to the owner and opened up negotiations for the taking up of the lease in his own name. In fact, knowing what Hamlin offered, Davis offered $5,000 more per year for the same, than his principal had been paying and finally Davis acquired the lease. Hamlin asked the Court to have Davis declared a trustee of the lease for him, upon the ground that his conduct was a breach of duty. What should the Court do?

RULING COURT CASE

Hofflin vs. Moss, Volume 67 *Federal Reports, Page* 440.

Moss was a manufacturer of some medicine. He entered into an agreement with the plaintiff by the terms of which the plaintiff was to make contract with Weekly Newspapers for the insertion of defendant's advertisement. By the terms of the contract it was planned that the defendant should pay for the advertising by selling the medicine to the publishers at a reduced rate, but still at such a rate that a small profit would be made. Defendant further agreed to pay the plaintiff for services, $2.75 for each contract thus placed.

The plaintiff sues for commissions, claiming that he has placed a large number of contracts and that the defendant has not paid him therefor. In defense, the defendant contended that plaintiff was really his agent, and as such had been guilty of a breach of duty. The evidence showed that the plaintiff owned and controlled a large amount of advertising space, for which he was now claiming compensation. It seems that the purpose of his scheme was not only to advertise, but to sell and make profits on the sales, in payment of the advertisement.

Justice Caldwell delivered the opinion.

Plaintiff, by virtue of his contract with the defendant, became his agent, and as such agent it was his duty to act solely for the interest of his principal. Here his primary motive was his own interest; such being the case he is entitled to no compensation.

The Court said in part: "The moment that the plaintiff accepted this agency for the defendants, the law bound him to the exercise of disinterested skill, diligence and zeal in carrying out the agency. He was bound to act in the utmost good faith towards the de-

fendants, and execute the agency in the mode he knew his principals expected and intended it should be carried out, and with an eye only to their interests. Instead of so acting he was contracting for and with himself, and his interests in the matter were directly inimical to those of his principals. An agent thus acting cannot recover commission or compensation for his services."

RULING LAW

Story Case Answer

By means of the relationship which exists between the principal and agent, the latter comes into possession of facts concerning his principal's business which, but for the relationship, he could never get. Because of this, the law imposes upon an agent the duty of exercising a very high degree of good faith and loyalty towards his principal, and the principal's interests. Without the consent or acquiescence of the principal, he may not sell his principal's goods to himself, or sell his own to the principal. Nor may he engage in any independent business or enterprise, for himself, or any one else, which would in any way conflict with his superior duty to his principal.

In the Story Case, the Court should rule that the lease be held by Davis in trust for Hamlin.

B. Agent Must Obey Instructions

STORY CASE

The Western Steamship Company instructed its ship master not to unload goods at the New York wharf until an order to that effect was delivered from the New York office. Captain Chase landed at the dock

at four P. M., one day, and deemed that it would be well to unload his ship at once, without orders. This was done, and during the following night the wharf and contents were destroyed by fire. The company now tries to hold Chase accountable for the value of the goods. Can it do this?

RULING COURT CASE

Whitney vs. Merchant's Union Express Company, Volume 104, *Massachusetts Reports, Page* 152.

Whitney, as drawer, held a draft upon which there was an amount with interest due from the drawee. He turned the draft over to the defendant express company, with instructions to present for payment, and to return at once if not paid.

When it was presented the drawee refused to pay the interest, but consented to pay the principal sum. The company communicated with the drawer, and allowed the drawee to keep the draft in the meantime. During this time the drawee was ready and willing to pay all except the interest thereon. The fourth day after presentment the drawee became insolvent. The plaintiff sues the company for the loss occasioned by their negligence.

Justice Colt delivered the opinion of the Court:

By failing to obey the instructions of their principal the defendants have become liable. The Court said in part: "It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions in all cases to which they can be properly applied. If he exceeds or violates or neglects them, he is responsible for all losses which are the natural consequences of his act."

RULING LAW

Story Case Answer

When a principal gives to his agent, clear, concise, unambiguous instructions, it rests not with the agent to question the expediency or wisdom of the course as mapped out. He may not substitute plans of his own. His duty is to obey, and only by obeying does he relieve himself from liability. However, if it appears that the instructions, as given, are ambiguous, then the agent must adopt some reasonable construction and do the best he can. Not even in this case will he be permitted to utterly ignore the instructions, and substitute his own plans and procedure.

In the Story Case, Captain Chase would be liable to the company for failure to obey their instructions.

C. Agent Must Exercise Care

STORY CASE

Clifford Clayton was a railroad messenger for the Eastern Express Company. Clayton acted in good faith, but carelessly permitted a new friend to enter the express car and the latter took a package containing valuable papers, for which loss the company was compelled to pay. What right has the company to compel Clayton to reimburse it?

RULING COURT CASE

San Pedro Lumber Company vs. Reynolds, Volume 121 *California Reports, Page* 74.

The San Pedro Lumber Company, a corporation, had its principal place of business in San Francisco. The defendant, Reynolds, was the general manager of the business, and had his office in San Pedro. He had control of all the affairs, all real and personal prop-

erty, and all employees of the company outside of the City of San Francisco.

It appears that he began to misappropriate some funds from the company and direct his bookkeeper to enter up false entries. Some of these false entries were very obvious and must have been known to the bookkeeper. It then appeared that the bookkeeper began also to misappropriate money and make false entries. These entries would have been apparent to Reynolds had he ever made an investigation.

When the conditions were disclosed upon the hasty departure of the bookkeeper, and when it appeared that Reynolds was also a wrong-doer, he pledged stock, which he owned, to secure any amount which he might owe to the corporation, either because of his own default or because of the default of the bookkeeper, in case it were held that he was answerable for him also. This was an action by the company to foreclose the lien upon the stock, and recover what money Reynolds was under obligation to pay.

Justice Henshaw gave the decision.

Reynolds is liable not only for his own default but also for those of his bookkeeper. He failed to use that degree of care and skill which should characterize one acting in the capacity of an agent. His own wrong, no doubt, tempted the bookkeeper. At any rate he might well have detected the wrong of the bookkeeper had he been exercising skill and care in the management of the business.

RULING LAW

Story Case Answer

When a person undertakes to act as agent for another, it becomes his duty to use ordinary care and

skill in the performance of such duties. Unless he does exercise the degree of care which by law is exacted of him in the agency relation, he is liable to his principal for all losses attributable to his neglect of duty. What degree of care is demanded of him, depends upon the nature of the agency, and the circumstances of a given case. It is sometimes said that an agent, to escape liability, must exercise that degree of care and skill, which he, as a reasonably prudent man, would have exercised in his own business. Certain it is, that the agent does not guarantee the success of his undertaking unless by special agreement; nor will he be held for honest and reasonable mistake of judgment. Consequently, in the Story Case, Clayton can be compelled to reimburse the company.

D. The Agent Must Account

STORY CASE

James Kellog authorized Frank Keeler, his western agent, to sell a certain lot of corn at fifty cents per bushel. Keeler sold the corn at fifty-two cents, but accounted to Kellog for fifty cents per bushel only. Later Kellog learned of the actual amount for which the corn was sold, and brought suit against Keeler for an accounting. Keeler was an employee on a salary. What should the Court do?

RULING COURT CASE

McKinley vs. Williams Volume 74, *Federal Reports* 94.

This was a bill in equity filed by Williams asking that McKinley be compelled to account for profits which the latter improperly received while acting as agent for Williams.

Williams stated he was the owner of large tracts of mineral land in the State of Minnesota, and engaged McKinley as an agent to assist in selling leases to the land. It was agreed between the parties that McKinley should sell these leases and receive, as compensation, one-fifth of the revenues derived from the leases which he might sell.

It appears that Williams executed to McKinley a formal lease to the whole property for which no consideration was paid, solely for the convenience of McKinley in selling leases.

Under these circumstances, McKinley pretended to be the real owner of these leases. He sold them, sublet promiscuously, took the money therefor and then refused to pay the plaintiff any part thereof.

Mr. Justice Sanborn delivered the opinion.

He was agent. Therefore, all profits made by his agency must go to his principal. The Court said in part: "The law guards the fiduciary relation with jealous care. It seeks to prevent the possibility of a conflict between the duty and the personal interest of a trustee. It demands that the agent shall work with an eye single to the interest of his principal. It prohibits him from receiving any compensation but his commission, and forbids him from acting adversely to his principal, either for himself or for others. It visits such a breach of duty, not only with the loss of profits he has gained, but with the loss of the compensation which the faithful discharge of his duty would have earned. An agent of a vendor, who speculates in the subject matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, and

becomes indebted to his principal for the profits he gains by his breach of duty."

RULING LAW

Story Case Answer

It has been heretofore explained that the agent acts in a fiduciary capacity. That is, because of the relation which exists between him and the principal, he is under a duty to act with the utmost good faith, wherever the interests of his principal are involved, Accordingly, if an agent takes advantage of his relation, or of information from his principal's business, or uses property of his principal, and makes thereby a profit for himself, he must account to his principal for such profit. Not only this but he may not even recover the compensation which was promised nim for his services.

In the Story Case, Keeler should be compelled by the Court to pay to Kellog fifty-two cents per bushel for the corn he sold; and he should not be allowed to recover any salary or compensation for making the sale.

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2. The Principal Owes Certain Duties to the Agent

A. The Principal Must Compensate the Agent

STORY CASE

Richard Stewart was requested by Robert Weil, an insurance broker, to try to sell Northern Life Insurance stock for him. Stewart was successful in disposing of twenty-five shares for which Weil collected. Weil offered to give Stewart a five per cent commission, which he contended was sufficient, and a reasonable amount to pay. Weil demanded ten per cent, which his lawyer showed in court was the usual subagent's commission. How much should Weil receive?

RULING COURT CASE

Garfield vs. Peerless Motor Car Company, Volume 89 *Massachusetts Reports, Page* 395.

The Peerless Motor Car Company was a manufacturer of automobiles, having its principal place of business in Boston. Garfield was engaged as an agent to sell their machines, and in the contract it was agreed, among other things, that he should have the exclusive right of sale in Worcester and vicinity. His compensation as provided by the contract was a fifteen per cent reduction from the retail price of each car.

The Peerless Motor Car Company itself made a sale to a person residing in Worcester. Garfield made a demand for his commission. The company refused and Garfield sued. The company contended that plaintiff could not recover, because he was entitled to commissions only when he made the sale himself. The plaintiff replied that he had the exclusive right to sell in his territory, and that there was a trade usage which gave him the right to compensation when a sale was made by another in exclusive territory.

Justice Metcalf delivered the opinion.

A contract of this kind gives the agent the right which excludes everyone, even his principal, from selling the article in question. The proof of the usage as contended for by the plaintiff in no way conflicted with their contract. Upon the basis of this usage the plaintiff is entitled to commission for the sale of the machine in question, even though the sale was actually made by the principal.

RULING LAW

Story Case Answer

As a general rule, an agent's right to compensation for service depends upon the agreement, express or

implied. If an agent does work for another, and it is agreed that he shall be paid for his services but nothing is said about the amount, the agent is entitled to recover what his services were reasonably worth. So, if a person does work for another expecting compensation, with the latter's knowledge or acquiescence, the former may recover what his services were reasonably worth, even though nothing was ever said about compensation.

In the Story Case, the agent should receive ten per cent because that was the reasonable value of his services, as shown from the custom proved.

B. The Principal Must Compensate the Agent When the Agency Is Terminated by the Principal

STORY CASE

Warren Lincoln, an insurance broker, appointed Simon Phillips his agent to solicit insurance business in the town of Springfield. Phillips agreed to take as compensation one per cent of the receipts of the business. Either party had the right to terminate the contract on five days' notice. Phillips worked for six months, and was on the point of closing two big contracts when Lincoln revoked the agency, and closed the contracts himself ten days later. Phillips brought suit for commission on these contracts. Lincoln defended on the ground that the revocation was according to the original agreement. Is this a good defense?

RULING COURT CASE

Warren Mfg. Company vs. Holbrook, Volume 118 *New York Reports, Page* 586.

The Warren Manufacturing Company produced a certain roofing material. The company engaged Holbrook to solicit contracts, in which this roofing material might be used. It was further agreed that Holbrook should have the right to do the work and pay the company an agreed price for the material.

Pursuant to the terms of this contract, Holbrook, with the assistance of the company, procured a contract with a railroad company, which would furnish a great deal of work. Holbrook immediately set about getting ready to do the work, when he was discharged by the company, who did the rest of the work and appropriated the profits.

In resisting the claim of Holbrook the company contended that they had reserved the right to discharge him at pleasure.

Justice Parker delivered the opinion.

Where a principal reserves the right to discharge at pleasure, he may undoubtedly do so, provided he does it in good faith. Here it was a question of fact whether it was done in good faith. The man was discharged soon after getting a lucrative contract, the profits from which went to the company. The Court said in part: "It was also urged in support of the motion for judgment, that by the terms of the agency the plaintiff was at liberty to terminate it at any time. That, therefore, the plaintiff did but exercise a right reserved of which the defendant cannot be heard to complain. We cannot assent to that proposition in the breadth contended for it. The right to terminate the agency had indeed only one limitation, but it had one. The time of its exercise was subject to the ordinary re-

quirements of good faith. When the compensation of an agent is depending upon the success of his efforts in procuring a contract for his principal and his subsequent performance of the work, the principal will not be permitted to stimulate his efforts with the promise of reward, and then, when the contract is obtained and the compensation assured after construction, terminate the agency for the sole purpose of securing to himself the agent's profits. At any time before there was a reasonable assurance that the contract would be obtained, the plaintiff might have terminated the agency."

RULING LAW

Story Case Answer

When an agent is engaged for no definite length of time, the principal may revoke his authority at any time, and the agent is entitled only to the services which he has already performed. If the agent's right to compensation depends upon his successful transaction of a given work, even though his agency is unlimited in time, the principal may not discharge him unless it is done in perfect good faith. There is an implied agreement to this effect between them. If an agent is engaged for a certain period, and is wrongfully discharged before the expiration of the period, he is entitled to the reasonable value of the services performed and damages for not being permitted to finish out his contract.

In the Story Case, the defense set up by Lincoln is not good, and Phillips would be entitled to recover the commissions for the contracts closed by Lincoln, and which he was about to close himself.

C. The Principal Need Not Compensate Agent When the Agent Abandons the Contract

STORY CASE

The Gilbert Coal Company employed John Clark, an attorney, to collect an account of $1,000 owing to them from a former customer. The employment was understood to be on the usual ten per cent basis, providing Clark collected the money. That is, he should receive ten per cent of the collection. Clark wrote several letters to the debtor, but before the money was collected, the debtor moved to another town. Clark did nothing about the matter for more than a year, and, without consulting him again, the coal company requested another lawyer, living in the town to which the debtor had moved, to collect the account. This lawyer collected the account and remitted to the company. Now Clark demands his share of the commission. The company refused to pay on the ground that Clark had abandoned the contract. Is this a good defense?

RULING COURT CASE

Warren vs. Rendrock Powder Company, Volume 9 *New York Supplement, Page* 842.

In 1882 Warren entered into an agreement with the powder company by the terms of which the plaintiff, Warren, was to assist the company in getting the United States to use a blasting powder manufactured by the defendant for a certain purpose. It was agreed that if the plaintiff succeeded in getting the United States to make the purchase, the plaintiff was to have a ten per cent commission on the sale.

Warren entered upon the work contemplated. He conducted experiments for the benefit of the govern-

ment employees who had charge of making the purchase. After having tested the powder, the government decided that it was not suited to its purpose. The plaintiff, during these months, had put in about half of his time in negotiating with the government. When the government rejected the bid of the powder company, the plaintiff made no further attempt to interest the government.

Two years later, the defendant, having improved the powder, again approached the government officers with a view to selling powder for use in blasting, originally contemplated, which had not yet been done. After testing it again, under experiments conducted by another agent of the defendant, the government purchased from the defendant.

The plaintiff then set up a claim for compensation. The defendant contended that he was entitled to no compensation because he had abandoned his contract before it was completed.

Justice Brady delivered the opinion.

Plaintiff's right to compensation depended entirely upon the government making this purchase through his efforts. In view of the fact that he ceased to take any interest in the project, and abandoned the work after the government first rejected his offer, he is not entitled to compensation, notwithstanding that a sale was made to the government.

RULING LAW

Story Case Answer

When an agent voluntarily abandons a contract by which he has agreed to serve another during a certain period, he is entitled to no compensation for what he has done.

In the Story Case, Clark is not entitled to any commission on the sum collected. He is considered as having abandoned the contract. Consequently, he is entitled to no compensation.

D. Principal Must Compensate for Work Done When Contract is Terminated Without the Fault of Either Party

STORY CASE

The Rover Typewriter Company entered into a contract with Herbert Hobson, appointing the latter as their representative in Spain for five years, beginning in 1895. It was agreed that Hobson should receive a stated salary per year and a commission on all typewriters sold in Spain, but that the commission should not be paid until the end of the five years' period, when an accounting should be made. At the time the Spanish-American war was declared there was a commission of $500 owing to Hobson. The war compelled the termination of the contract of agency. The company refused to pay a commission on the ground that this was not to be paid until the end of the five-year period. Can the company be compelled to pay?

RULING COURT CASE

Clark vs. Gilbert, Volume 26 *New York Reports, Page* 279.

Gilbert had a contract with the government of the United States for the construction of a sectional dry dock at Mare Island, California, and was to have a lease of the dock for three years for the repair of merchant vessels as well as government vessels. Hiermans was engaged by Gilbert to take charge of his

business in California until his lease expired. He was to receive a specific salary and one-third of all profits. Just prior to the time when the contract would have been completed, Hiermans died. Gilbert and his associates refused to pay his estate the share of the profits which accrued up until the time of the death of the agent. So Clark, as executor of Hiermans, brings this action to recover the amount due from Gilbert to Hiermans.

The decision of the Court is contained in the following statement: "The Court decided in *Wolfe vs. Howes,* 20 *New York* 197, that where a person is prevented by sickness or death from fully performing a contract for personal services which he has partially performed, compensation may be recovered for the services actually rendered by him, under the contract. That decision shows that the plaintiff, as executor, may recover, in this case, compensation for the services which his testator, Hiermans, rendered for the defendant, although he was prevented by sickness and death from performing all he was to render according to the agreement between them."

RULING LAW

Story Case Answer

If, for any reason, the relation of principal and agent is terminated without fault of either party, as by the death of the principal or agent, or by the destruction of the subject matter without fault of the agent, the agent is entitled to be compensated for what he has done. This right is not necessarily based upon the contract, but the compensation agreed upon is evidence of what his services were worth. He should re-

ceive a reasonable compensation for his services, determined by all the circumstances.

In the Story Case, Hobson should receive the commissions due up to the time of the commencement of the war, because the contract was terminated through no fault of either party.

E. The Principal Must Reimburse the Agent for His Expenditures in Behalf of the Principal

STORY CASE

Richard Mundy, an engineer in the employ of the Interstate Construction Company, was sent to New Mexico to make an irrigation survey in accordance with a contract existing between the construction company and the Southwest Land Company. By this contract, the former agreed to build a dam within a stated period. Mundy spent four weeks on the survey and then learned that his work was erroneous because of a mistake he negligently made in starting operations. He then employed aid to help him complete the work within the stipulated time, paying for this service out of his own money. When the work was completed, he asked for reimbursement from his company for these advancements. The company refused to pay on the ground that the expenditures were caused by Mundy's own carelessness. Is this a valid objection?

RULING COURT CASE

Veltum vs. Koehler, Volume 82 *Kentucky Reports, Page* 49.

Veltum was the owner of a tract of land upon which there were two mortgages. He went to Koehler, who

was the head of an abstract company, and engaged him to secure a loan of money and pay both mortgages. The agent immediately procured the loan and paid one mortgage, and had sufficient funds remaining with which to pay the other, but he negligently overlooked the second mortgage, and it was foreclosed before anything was done. After foreclosure, he redeemed the mortgage, but the money remaining in his hands was not then sufficient to pay the principal, interest and costs. So he personally advanced $246, for which he claims reimbursement in this action.

Justice Armstrong delivered the opinion.

Koehler bound himself, in consideration of the commissions he was to receive, not only to effect the loan, but to pay and discharge the prior mortgages with the funds thus obtained. He was bound to discharge that duty faithfully, and is clearly not entitled to reimbursement for costs and expenses incurred by a foreclosure caused solely by his neglect. It may be stated, as a general rule, that an agent is entitled to reimbursement for all advances and expenditures made in the cause of his agency, for the benefit of his principal, when the same have been paid properly, and in good faith. But he cannot claim reimbursement when the advances and expenditures were rendered necessary by his own failure to exercise care and diligence in the performance of the duties of his agency. When they were incurred, and made necessary, by his own neglect, the principal is not liable therefor.

RULING LAW

Story Case Answer

When an agent uses his own money in carrying on the business of his principal, or in furthering his in-

terest, he is entitled to receive, from the principal, the amount he has thus personally expended. This is known as the right of reimbursement. If the agent exceeds his authority in spending such money, he does so at his peril. Likewise, where the necessity for such expenditure arises by his own negligence, or default, the principal is under no duty to reimburse him.

In the Story Case, the objection made by the company, to the payment of the advancements made by Mundy, is valid. The company is under no liability to reimburse Mundy, when the advancement was caused through his own negligence and carelessness.

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3. Principal and Agent Owe Certain Duties to Third Persons

A. Either Principal or Agent May Be Liable for Civil Wrong of Agent

(1) Agent Is Liable for His Own Wrong Although Acting for His Principal

STORY CASE

Joseph Madison was the general superintendent of the Waterbury Steel Company. John Winters, an employee of another company, while at the mill on business, was seriously injured, because of the act of an ignorant and careless workman, whom Madison had employed without determining his fitness for the position he occupied. Madison was negligent in employing this man. Now, it occurred, that at the time Winters was injured, the Waterbury Steel Company became a bankrupt concern, and a judgment against it was of little value. Winters, thereupon, brought suit against Madison, alleging that the injury was caused by the

act of the latter in carelessly employing the workman. Madison defended on the ground that he was merely an agent. Is this a good defense?

RULING COURT CASE

Mayers vs. Thompson-Hutchinson Co., Volume 104 *Alabama, Page* 611; *also Volume* 28 *Lawyers' Reports, Annotated, Page* 433.

The Hutchinson company had contracted to erect a brick school building on public property in Birmingham. A frame structure, which formerly occupied the site, was moved back, so that the space between the old one and one to be erected was a little over seven feet. A fence was erected between them, and the entrance to the wooden building was on the side nearest to the brick one.

Plaintiff was a twelve-year-old boy, and attended school, which was still held in the old building. While the pupils were standing in line one morning, preparatory to going home, a cry of: "Look out!" came from the new building; this was followed by a shower of bricks, one of which struck the plaintiff on the head, causing serious injury, and for which this action is brought against Thompson, as agent of the company.

The main question was as to the liability of Thompson, who was only an agent of the construction company. The plaintiff claimed that Thompson was liable because of his failure to erect a scaffold and guards, to prevent bricks from falling upon passers-by. In reply to this, Thompson contended that an agent, or servant, is not liable for mere omissions.

Justice Coleman delivered the opinion.

An agent is personally liable for his failure to act and do his duty, to the same extent that he would have been liable had he been acting independently.

The Court said in part: "We think the better rule, declared in *Baird vs. Shipman, Volume* 22 *American State Reports, Page* 504; *Volume* 132 *Illinois, Page* 16; *Volume* 7 *Lawyers' Reports, Annotated, Page* 128, in which it was held that 'an agent of the owner of property, who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to third persons for injuries resulting to the latter while using the premises in the ordinary and appropriate manner. The agent cannot excuse himself on the plea that his principal is liable. It is not his contract that exposes him to liability to third persons, but his common law obligation to use that which he controls so as not to injure another.' "

RULING LAW

Story Case Answer

When an agent undertakes to perform an act and does it negligently, he is answerable to third persons for all damages which result from his negligence. The mere fact that he was acting as agent is no defense. Neither is the fact that his principal may be held for the same damages. Of course, each cannot be held. If collection is made against one, judgment cannot be secured against the other.

The defense put up by Madison, in the Story Case, would not be good. He would be personally liable for his negligence.

(2) The Principal Is Liable for the Agent's Wrong When the Agent Is Acting Within the Course of His Employment

STORY CASE

James Bass, a delivery wagon driver for Pugh & Company, was instructed, by his employer, never to drive his horses faster than a walk along Meridian Street in making deliveries. On the day when the accident noted below occurred, Bass was on this street making a delivery, and being late, he drove his horses in a trot. The street was crowded, and as a result of the rapid driving, a collision occurred, in which Frank Bell was severely injured. Bell brought an action against Pugh & Company for negligence of the servant. Pugh & Company put in as defense, the written authority, given to the servant, not to drive faster than a walk. Should this free them from liability?

NOTE: The rule, with reference to agent and servant, is the same throughout these cases.

RULING COURT CASE

George vs. Gobey, Volume 128 *Massachusetts, Page* 289.

There was a Statute in Massachusetts, which provided, that any person who sold liquor to one who has the habit of using it to excess, after notice of his habit, and a request from the wife of such person, not to sell liquor to him, should be liable to a penalty to be recovered by the wife of such person.

The husband of the plaintiff was known to be an habitual drunkard. The wife had notified the defendant not to sell him liquor. Notwithstanding this, the defendant, through an agent, sold to the plaintiff's hus-

band. This is an action to recover the penalty provided for the violation of the Statute. The defendant contended that he was not liable, because he had repeatedly forbidden his agent to sell to such persons.

Justice Soule delivered the opinion.

Although forbidden, the agent binds his principal by his wrongful acts, so long as he keeps within the scope of his employment. The Court said in part: "At common law, the master is responsible for the wrongful acts of his servant, done in the execution of the authority given by the master, and for the purpose of performing what the master has directed, whether the wrong done be occasioned by the mere negligence of the servant, or by wanton and reckless purpose to accomplish the master's business in an unlawful manner. But if the servant goes outside of the scope of the employment and does a wrongful act, for the purpose of his own, and not in the performance of his master's business, the master is not responsible for such act." The agent's employment was, in this case, to sell liquor, and clearly he was acting within the scope of his work. The defendant is liable for the penalty.

RULING LAW

Story Case Answer

It is generally said that a principal, or a servant, is liable for all torts done by the agent, or servant, while acting within the course of his employment. That is to say, if the agent is carrying on, or purporting to carry on, his principal's business, and commits a tort, his principal is liable. It is not a valid defense for the principal to say that he did not authorize his agent to do the act in question, but expressly forbade it.

In the Story Case, Pugh & Company would be liable for the injuries caused by Bass, the servant, for the reason that, at the time of the injury, he was acting within the scope of the authority, even though in a manner expressly forbidden by the principal.

B. Liability of a Principal or Agent Upon Simple Contracts, When the Principal Is Known, Depends Upon Circumstances

(1) Principal May Be Liable on an Unauthorized Contract When Made in an Emergency and Where It Is Reasonable

STORY CASE

A wreck occurred to a passenger train of the M. & O. R. R. Company, while the train was in the heart of a large forest. As a result, several people were severely injured, including the conductor of the train. The company had previously issued an order to the effect that none, except the conductor, should have the authority to employ a physician in an emergency. Nevertheless, in this case, the brakeman employed Dr. Otis Stevenson, in the name of the company, to minister to the injured. Stevenson was on this particular train. Later, when he demanded compensation, he was refused, on the ground that the brakeman had no authority to act. Should Stevenson be permitted to recover?

RULING COURT CASE

Bartlett vs. Sparkman, Volume 6 *American State Reports, Page* 35; *Volume* 95 *Missouri Reports, Page* 136; *Volume* 8 *Southwestern Reports, Page* 406.

The wife of the defendant became suddenly ill one night; he sent his brother to the nearest village, four-

teen miles, to get Dr. McCowan. His brother, being unable to get the doctor desired, went to Dr. Bartlett, who went out to the defendant's home. By the time Dr. Bartlett reached the defendant, the danger was over, and his services were not needed. Some time later, Dr. Bartlett presented a bill to the defendant for the visit, which he refused to pay, whereupon, this action was brought. It was contended by the defendant, that he was not liable, because his agent had completely transcended his authority in getting the one doctor, when he specifically instructed him to get another.

Justice Norton delivered the opinion.

True, the general rule is that a principal is never bound by a contract made in excess of, or without authority, but, in a case of emergency, such as this, the principal may be held if the agent acted reasonably and in good faith.

RULING LAW

Story Case Answer

Where an agent, without any authority whatsoever, or in excess of his actual and ostensible authority, purports to make a contract for another, obviously, the latter is under no liability on such a contract. It is sometimes said that, in case of extreme emergency, an agent may bind a principal by an unauthorized contract, if he acts reasonably and in good faith.

In the Story Case, the company would be liable for the services of the physician. The brakeman had the power to hire a physician in such a case of extreme necessity.

(2) The Principal Is Never Liable on an Unauthorized Contract When the Third Person Knows of the Limitation

STORY CASE

James King, the general manager of Stone & Company, executed, to Frank Ellis, a negotiable note of the company in payment for merchandise delivered. Ellis objected to taking the note, saying to King that Stone & Company had previously informed him never to take negotiable paper from any of their general managers. King replied that, nevertheless, the paper would be all right in this case. Ellis finally took the paper. Later, the company refused to pay the note, and suit was brought against the company, on the ground, that it is the usual custom of general managers for commission houses to give such paper, and King was acting within the apparent scope of his authority. The company presented, as their defense, the lack of authority, and the knowledge of Ellis. For whom should judgment be given?

RULING COURT CASE

Rogers vs. Halden, Volume 142 *Massachusetts, Page* 196.

It appeared, in this case, that the plaintiff employed an agent, Norris, to sell goods for them. Norris was specifically instructed never to sell any goods below a certain price, called the "minimum price". The agent was negotiating with defendant, with a view to selling him goods. At this time, the defendant knew that the agent had no power to sell below the "minimum price", and he knew what those prices were.

Notwithstanding this, the defendant agreed to purchase goods at prices below the "minimum price".

The agent sent in the order with "minimum price" quoted. The plaintiff sent the goods in pursuance of the order. The defendant paid to the agent the prices agreed upon between themselves. The agent reported to the plaintiff that the defendant had paid the "minimum price". Thereupon, the plaintiff charged this amount to their agent. Subsequently, they discovered the detail of the transaction, as recited above, and brought this action as against the defendant for the balance due them, being the difference between the price agreed upon by the defendant and the agent, and the "minimum price" as made by the principal.

Justice Gardner delivered the opinion.

Where a third person knows of the limitations upon the authority of an agent, with whom he deals, no agreement by the agent outside of this authority will be binding upon the principal. The Court said in part: "The defendant says, 'We did not make this contract, although we knew that Norris ordered the goods for us at the minimum prices, and, although we received the bills of the goods at the same prices at which they were ordered, we have remained silent ever since. Yet, we made an agreement with Norris, which we knew he was not authorized to make, to buy goods at a less price.' We think that the defendant cannot set up this agreement for the purpose of denying the contract which the law says exists between him and the plaintiff. He will not be permitted to take advantage of his own wrong, for his own benefit."

RULING LAW

Story Case Answer

We learned, in the section covering construction of agents' authority, that the principal is liable for any

act of the general agent done within the apparent scope of his authority. It is true, therefore, that if the third person has actual knowledge of the agent's limitations, anything done beyond this is both unauthorized and beyond the apparent scope of authority, and the principal is not bound thereby. Therefore, in the Story Case, although it is usually within the scope of authority of a general manager for a commission house to issue negotiable paper, and thereby bind the house, he cannot hold the principal in this case, since Ellis knew of the actual limitation. Had Ellis been innocent, he could have held Stone & Company.

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(3) The Agent Is Liable for a Breach of Warranty in Making an Unauthorized Contract

STORY CASE

John Black made a contract with the Hayes Lumber Company, representing himself to be the agent of the White Construction Company. The contract was for the delivery of lumber, by the lumber company, to a building in construction by the White company. Black was the agent for the construction company, but acted outside of the scope of his authority, in making this contract, and his company refused to accept the lumber upon delivery. The Hayes company brings suit against Black on the contract. Black puts in defense, the fact that no contract was made with him personally, and that he was an agent. Can the Hayes company recover in this suit?

RULING COURT CASE

White vs. Madison, Volume 26 *New York Reports, Page* 117.

It appeared from the evidence in this case that the defendant, Madison, as a deputy sheriff, had seized property under an execution. Pending litigation, as to who owned the property, it remained in possession of the deputy sheriff. Without the knowledge or consent of the sheriff, Madison had the property insured, he gave a note for the premium, signed thus: "N. D. Snow, Sh'ff Chan. Co., by A. Z. Madison, Dep. Sh'ff."

This was an action, by White, as receiver for the insurance company, to recover upon the note. It was admitted, by the defendant, that he had no authority, unless it was implied from the fact that he was deputy sheriff. As to this, the Court was of the opinion that no such power was implied. Then the defendant contended that he was not liable, because the company knew that he did not intend to be bound by the contract, but was making it as an agent.

The Court was of the opinion that he was liable—not upon the note itself, but for damages for a breach of implied warranty, viz., that he had power to bind the principal.

Mr. Justice Selden, on this point, said: "In those cases, and I think in all cases, where one, pretending to be agent, has contracted as such without authority from the principal, the party contracted with, on learning the facts, must have the right to repudiate the contract and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action might be maintained on the contract itself, and the damages must be measured, not by the contract, but by the injury resulting from the agent's want of power. Whenever a person enters into a contract as agent for another, he warrants his own au-

thority, unless very special circumstances, or express agreement, relieve him from that responsibility."

RULING LAW

Story Case Answer

Whenever an agent represents to a third person that he has authority to make a contract, and no such authority exists, the agent is not personally liable on the contract, but is liable for a breach of warranty for making the representation as to his power. He is not liable on the contract, because it was not the intention of the parties that a contract should exist with him. The money, which may be collected from the agent by way of damages for the misrepresentation, depends upon the actual loss suffered.

In the Story Case given above, the Hayes company cannot recover against Black on the contract. The company should have brought suit against him for breach of warranty, and, in this way, recover the actual losses suffered.

The liability of an agent is the same for acting beyond the scope of his authority, or for acting without any authority.

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(4) The Agent Is Liable Although He Intends to Bind His Principal, When He Signs a Written Contract in a Manner Binding Himself

STORY CASE

Adolph Bartlett was the president of the Bartlett Publishing Company, a corporation. As such officer, Bartlett made the following contract: "Harry London, party of the first part, and Adolph Bartlett, president of the Bartlett Publishing Company, party of the

second part, hereby agree as follows:" The terms of the contract were then set out and it was signed: "Adolph Bartlett, President of the Bartlett Publishing Company." Later, the publishing company defaulted on this contract, and London brought suit against Bartlett personally. Bartlett put in a defense to the effect that he was acting as an agent, as the contract showed. Is this a good defense?

RULING COURT CASE

Simonds vs. Heard, Volume 34 *American Decisions, Page* 41.

In this case, it appeared that the Town of Wayland planned to build a bridge within its corporate limits. It, accordingly, passed legislation, and appropriated money for that purpose.

Heard and others, as town committeemen, made a contract with Simonds for the erection of the bridge. The introductory part of the contract read as follows: "Witnesseth this agreement between Heard, and others, committee of the Town of Wayland, on the one part, and Simonds, on the other part." The contract also concluded: "Said committee are to pay said Simonds the sum of three hundred and seventy-five dollars, when the work is completed."

Upon completion of the contract, the contractor sued the committeemen personally. It was contended by them that it was never their intention to be bound; that they were acting for the town, and for the town alone.

Mr. Justice Shaw delivered the opinion.

The defendants rendered themselves personally liable because they contracted in their own name, without making it clear that they were acting solely for the

town. This they might have done by drawing up the contract in that manner.

The Court, commenting upon the contract, said: "Two things are here observable. The first is that they do not profess to act in the name of, or in behalf of, the town, otherwise than as such an intention may be implied from describing themselves as committee. But such a description, although it may have some weight, is far from conclusive. The second and more decisive circumstance respecting this contract is, that there is an express undertaking on the part of the committee to pay: "Said committee are to pay, etc." Having described themselves as a committee, this undertaking is as strong and direct as if their names had been repeated, and Heard, and others, had promised to pay. The Court is therefore, of the opinion, that by the terms of this contract, the committee intended to bind themselves, and did become personally responsible, and that the action is well brought against them.

RULING LAW

Story Case Answer

In the majority of cases, an agent never intends to bind himself personally on contracts which he makes for his principal, and though the liability is said to depend upon the intention, it is not his secret intention, which governs, but it is his intention as manifested by his words and conduct. Accordingly, if an agent uses apt words to bind himself, and does not negative a personal liability, he may be held personally to such contract. This is illustrated in the Story Case above, where although it was the intention of Bartlett to bind the corporation, he so worded the contract and signed it in such a manner as to bind himself. Had he signed

the contract: "Bartlett Publishing Company, by Adolph Bartlett," this would clearly have indicated an agency and he would not have been liable personally. Had the contract not been entirely in writing and had it been necessary to introduce oral evidence to show what the entire transactions were, then, although Bartlett signed as he did, it could have been shown that he was acting merely as an agent. To illustrate: Suppose there had been several letters passing between the parties and these, with conversations, made up the contract indicating an agreement with the company, then Bartlett could not have been held. But if, as in the Story Case, the entire contract is written and signed by the parties, oral evidence cannot be given to show that the parties were other than as stated therein. The addition to Bartlett's name is said merely to describe him, and does not make the corporation a party to the contract.

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(5) The Principal's Liability May Be Terminated, If the Third Person Accepts the Agent as the Debtor

STORY CASE

Steven Miner was the road superintendent of John Meyer, a contractor. Miner had authority to employ and remunerate the employees under him. Burnham was an assistant foreman to whom there was owing $200. This amount Miner collected, of which fact Burnham had knowledge. Miner, however, stated to Burnham, that it would be a personal favor if the latter would permit him to keep the money ten days, accepting, in the meantime, Miner's personal note for the amount. This was done, but neither the note nor any

amount was ever paid to Burnham. He brought suit for the sum against Meyer, the principal, who put in the defense of payment to Miner, and the acceptance of the note by Burnham. Is this a good defense?

RULING COURT CASE

Lincoln vs. Battelle Volume 6 *Wendell's Reports* 475.

The defendant owned large estates in the Island of St. Croix. She engaged Thomas Battelle to employ overseers for the proper management of these estates. He employed Lincoln among others, who performed his work in a satisfactory manner. The defendant, Sidney Battelle, had given her agent sufficient funds to pay for the services of these overseers. Lincoln knew this and received from the agent a part thereof. But he was not paid the balance. He brings this action against the defendant for the balance due. It was contended by the defendant that the plaintiff's knowledge of the facts above recited and his acceptance of a part payment from the agent was equivalent to the credit of the agent.

Justice Savage delivered the opinion.

Where a person is employed by an agent, he may call upon the principal for payment for the services rendered. He may do this although he knows that the agent has charged the demand to the principal and received the funds, unless he has agreed to discharge the principal and rely upon the responsibility of the agent. No facts appeared in this case which showed that the plaintiff relinquished his right against the principal, and so he was permitted to recover.

RULING LAW

Story Case Answer

It is a well established principle that a principal is bound by all the acts and contracts made for him by his agent so long as the agent acts within the course of his employment, and does not exceed his real or ostensible authority. This is a necessary conclusion from the theory of the relationship, that he who does a thing through another does it himself. Further, the agent is not liable upon such a contract unless he expressly assumes personal liability. Also the third person can continue to hold the principal although he also has the credit of the agent, unless by word or conduct he releases the principal. In the Story Case, by accepting the note of Miner, the agent, and permitting him to keep the money given by the principal, Burnham has in fact by conduct released Meyer and created a new relation of debtor and creditor between himself and Miner.

C. When the Principal Is Unknown, All the Elements of Agency May Nevertheless Exist

(1) The Principal May Hold the Third Person

STORY CASE

Amos Reeves bought a horse of Simon Burnett. After the purchase was made Reeves instructed Burnett to deliver the horse to Edward Boardman's barn. He then stated that the purchase had been made for Boardman. That is, Reeves made the purchase for an undisclosed principal, when Burnett thought he was acting for himself. This was done because Burnett and Boardman were not friends. When Burnett

learned for whom the horse had been bought, he refused to deliver, although the purchase price was offered. He stated that he would not contract with Boardman, and was not under contract with him. Boardman brought suit against Burnett for failure to deliver the horse. For whom should the judgment be given?

RULING COURT CASE

Tutt vs. Brown, Volume 5 *Litt. Ky., Page* 1, *Also Volume* 15 *American Decisions, Page* 33.

George Tutt, son of the plaintiff in this action, while in the service of his father and acting for his benefit, contracted with Brown to transport, in his father's wagons, certain property belonging to Brown. For the services, Brown agreed to pay him a certain sum, not knowing or thinking that the son was merely an agent. Brown failed to pay George the price agreed upon for transporting the baggage, and this suit was brought in the name of his father to recover the price.

Justice Owsley delivered the opinion.

It is a well-settled principle that the principal may hold a third person upon a contract made for his benefit, even though at the time the contract was made he was not disclosed, or known to the third person. This right of the principal to hold the third person is limited. "Thus in an analogous case Lord Mansfield also erred: 'Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal,' and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any

claim he may have against the factor, in answer to the demand of the principal."

RULING LAW

Story Case Answer

When an agent goes out to act in a representative capacity he generally makes known who his principal is, or at least that he has a principal. But, if he does neither, he is said to be acting for an undisclosed principal. However unjust it may seem, it is a familiar principle of Agency that a principal may enforce a contract, made for his benefit, against the third person, even though he was not disclosed when the contract was made, and even though the third person would never have contracted with him, had he known it, as in the Story Case. Of course, if the third person has any defense against the agent with whom, alone, he thought he was contracting, it would not be fair to deny him the right to this defense against the principal, and so it is universally conceded that any defense good against the agent is good against the undisclosed principal, if he should start suit.

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(2) The Third Person May Hold the Principal After He Is Disclosed

STORY CASE

Louis Forgan employed August Whitaker, secretly, to act as his agent in buying a number of shares of stock of the Northwestern Railway Company. Whitaker contracted to purchase a block of this stock, doing so in his own name. Later the stock depreciated in value and Whitaker refused to take it. As he was insolvent, the vendors could not force him to pay. A

year later the vendors learned how Whitaker had been, in fact, acting for Forgan. Can they now hold Forgan for the contract made by Whitaker?

RULING COURT CASE

Beebe vs. Roberts, Volume 12 *Wendell, Page* 413; *Volume* 27 *American Decisons, Page* 132.

One Hooley, a factor purporting to act for the plaintiff Beebe, purchased of the defendant twenty-five bales of packed cotton. At the sale the agent did not disclose for whom he acted. The cotton proving worthless, the plaintiff sued the defendant upon the warranty made by him as to its quality. It was contended by the defendant that plaintiff could not sue upon the contract, for he was not a party to it.

The Court, by Sutherland J., decided that "the suit was properly brought in the name of the present plaintiffs. Hooley acted as their factor or agent merely in the purchase of the cotton * * * * when goods are bought by a broker or other agent, and he does not disclose his principal at the time, the prncipal, when discovered, is liable on the contracts which his agent has made for him." Since the principal is liable, when discovered, he can also bring the suit against the third person. Accordingly, the judgment was given for the plaintiff.

RULING LAW

Story Case Answer

The third person may hold the principal upon contracts, even though the third person knew nothing of the principal at the time he entered into the contract. The principal can be held when he is discovered, if it is learned that the contract is really made for his benefit.

In the Story Case, Forgan can be held on the contract made by Whitaker. Forgan is an undisclosed principal, and as soon as he is disclosed the third person has the right to hold either the agent or the one for whom he acts.

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(3) The Third Person May Hold the Agent Upon Whose Credit He Depended

STORY CASE

Heber Davis, acting as agent for Charles Hostetter, purchased an automobile from James Owen. Owen did not know that Davis was acting as agent at the time of the making of the contract. Two days later Davis informed him of that fact, stating that he must look to Hostetter for the money and the acceptance of the car. Owen, nevertheless, determined to hold Davis on the contract. Can this be done?

RULING COURT CASE

Raymond vs. Crown and Eagle Mills.

Rogerson was a duly authorized agent of the Crown and Eagle Mills, and, as such, was empowered to transact all their business. In pursuance of this power he purchased certain goods from Raymond, the plaintiff, telling him at the time that the goods were to be used by the Crown and Eagle Mills, and he ordered them to be so marked. Raymond did not know that Rogerson was acting for the Crown and Eagle Mills, and made no inquiries. They delivered the goods to the Mills, and charged the goods to Rogerson personally.

Raymond sued Rogerson for the price thereof. Before the writ was served he discovered that the Crown and Eagle Mills was the principal and the name of the

corporation was inserted in the writ. After the case was tried and carried to the Supreme Court on appeal, the name of Rogerson was stricken by leave of the Court.

It was contended by the Crown and Eagle Mills that it was not liable, because the plaintiff gave voluntary credit to the agent Rogerson when he had knowledge or means of finding out that he was a mere agent acting for the Crown and Eagle Mills.

The following general principles were stated by the Court: "The authorities are universal in maintaining the doctrine that when the principal is unknown to the vendor at the time of the sale, he may, upon discovering the principal, resort to him or to the agent with whom he dealt, at his election.

As to the contention that the purchaser had means of finding out who was the principal, the Court said: "There must be actual knowledge, on the part of the vendor of the relation of the parties and their interest in the matter, to exonerate the principal by giving credit to the agent as his debtor. If, with such knowledge on the part of the vendor, he chooses to give credit to the agent, he discharges the liability of the principal. It is, however, not enough that there exist circumstances that would, in the minds of some men, have awakened suspicion which would lead to further inquiry. "If the vendor did not have knowledge at the time the sale was made that there was a principal, he may at any time later, on learning about the principal, hold the latter. If he chooses to hold the latter he cannot hold the agent. But, until he does choose to hold the principal, he has the agent liable on the contract.

RULING LAW

Story Case Answer

When a third person contracts with an agent, not knowing that he is acting as an agent, it would be very unfair if the third person could not hold the agent with whom he intended to contract. So, it is well settled that the third person may look, either to the principal, as we have seen above, or he may look to the agent, to whom he, in fact, gave credit. He cannot, of course, hold both and he must elect which one he desires to hold.

Owen can hold Davis, in the Story Case, on the contract. Owen contracted with Davis, relying on Davis' credit, and he is not obliged, unless he choose to do so, to accept Hostetter on the contract.

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(4) The Agent May Hold the Third Person

STORY CASE

Crawford Kennedy, as agent for the Cherry Red Brick Company, made a contract with the Holtzer Machine Company for the purchase of machinery to be delivered as Kennedy instructed, on the first day of the following year. Kennedy did not disclose his principal at the time of making the contract. The Holtzer company was not ready to deliver on the day named, because of a fire in their plant, and since they had not protected themselves by covering such a possibility in their contract, Kennedy brought suit on the contract, stating, in the declaration to the Court, that he was acting as agent for the brick company. The Holtzer company then maintained that Kennedy could not recover in this suit, because he was an agent in making the contract. Is this a good defense?

RULING COURT CASE

Colburn vs. Phillips, Volume 3 *Gray (Massachusetts), Page* 64.

Colburn made a contract with Phillips, by which the latter agreed to ship two hundred tons of stone from Salem to Norfolk, Virginia, at $175 a ton.

The plaintiff brought this action, alleging that he was acting as agent for Grant and Christey, in making the foregoing contract, and that his principal was compelled to pay a higher rate than agreed upon, which was paid under protest, and for the recovery of which this action is brought.

The defendant contended that the plaintiff had no claim, whatsoever, against him, because his declaration admitted that the contract, though made in his own name, was for the undisclosed principal, who, alone, should be permitted to sue.

Mr. Justice Hoar said: "In *Sims vs. Bond, Volume* 5 *Barnewell & Adolphus (English), Page* 393, Lord Denman asserts that, 'It is a well-settled rule of law, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it.' "

RULING LAW

Story Case Answer

Since the third person is generally permitted to hold the agent, the agent is permitted to hold the third person upon contracts made for an undisclosed principal.

In the Story Case, the defense made by the Holtzer company is not good. The agent is permitted to sue when he has made a contract for an undisclosed principal.

D. The Agent Is Liable on a Sealed Contract if His Principal Is Not Named and the Agent Merely Describes Himself as Such

STORY CASE

The following contract, under seal, was made between Pratt Ross and Rainey Johnson: "Pratt Ross, vice president of the Harper Fuel Company, party of the first part, and Rainey Johnson, party of the second part, herein agree with each other, as follows:" (Then followed the terms of the contract.) The contract was then signed: "Pratt Ross, agent for, and vice president of, the Harper Fuel Company", and "Rainey Johnson", with the word "seal" at the end of each signature. Later, the Harper Fuel Company failed to fulfill the contract, and a lawsuit was begun against Ross personally. The latter put in defense, that he was merely acting as agent. Is this a good defense?

RULING COURT CASE

Buggs vs. Partridge, Volume 64 *New York, Page* 357.

One Hulburt, purporting to act for Partridge, agreed to purchase land from Buggs on behalf of Partridge. They drew up a contract, under seal, by which Buggs agreed to convey, and Hulburt to accept, title, for which conveyance, Hulburt further agreed to pay a certain sum. The name of Partridge did not appear in the contract.

This was an action brought by the plaintiff against the defendant for the recovery of the purchase money. To this demand, the defendant replied that, whatever may have been the understanding of all the parties concerned, he is not bound by the contract, for it was a

sealed contract, and his name nowhere appeared in it as a party thereto.

Justice Andrews delivered the opinion.

The defendant was not bound by this contract. It is a well settled, but technical rule, that no one is bound by a sealed contract unless his name appears in it as a party thereto.

RULING LAW

Story Case Answer

A contract under seal by an agent, is not binding upon the principal unless his name appears in the instrument. In such a case, the instrument binds the agent alone. If the document is under seal, only those parties named therein are bound. This is true, even though the agent describes himself as agent. He must name his principal as the party contracting, in order to free himself. Hence, in the Story Case above, Ross is bound and liable on the contract, because he named himself, personally, as a party, although the instrument did also show that he was acting as agent. Had he written in the contract, and signed it, "Harper Fuel Company, by Pratt Ross, vice president", it would then have been the contract of the company, and not his own.

E. The Principal Must Be Named as a Party to a Negotiable Instrument in Order That He Shall Be Liable

STORY CASE

Henry Judson was the manager of the Kenesaw Coal Company. As such officer, and with the authority of the company, he executed a promissory note and signed it, "Henry Judson, manager of the Kenesaw Coal

Company". Later, the coal company was sued on the note, and it put in the defense that liability did not exist, since it was not named as a party in the instrument. Will the defense stand as a bar to recovery against the company?

RULING COURT CASE

Webster vs. Wray, Volume 19 *Nebraska Reports, Page* 558; *Volume* 56 *American Reports, Page* 754.

In this case, T. B. Webster, acting as agent for E. D. Webster, made and delivered certain promissory notes to Wray. These notes were signed by T. B. Webster, and the name of E. D. Webster did not appear in them at all. Wray sues the principal, E. D. Webster, upon the theory that the acts of an agent bind his principal, so long as the agent does not exceed his real or ostensible authority. He wished to introduce evidence to show that T. B. Webster acted for E. D. Webster. The evidence was excluded.

Cobb, Jr., delivered the opinion of the Court, and quoted, with approval, the following: "The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue on a negotiable instrument, can be shown by parol evidence, even as between the immediate parties to the transaction." This rule "is derived from the nature of negotiable paper, which is made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the maker as the original payee has." Accordingly, it was held that the defendant, E. D. Webster, was not liable upon these notes, even though they were made by his agent, while acting within his authority.

RULING LAW

Story Case Answer

An agent, who signs his own name to a negotiable instrument without inserting the name of his principal, is bound, and no liability, whatsoever, attaches to the principal. In such a case, an agent should always sign: "P, by A, his agent"; and so, in the Story Case, the plaintiff cannot recover against the Kenesaw Coal Company, for it is not named as a party to the instrument, although its name appears thereon. It should have appeared as the one making the promise. As it is, the name appears only as descriptive of Henry Judson.

VIII. TERMINATION OF THE RELATION

1. By Act of the Parties

A. Expiration of the Term of Agency

STORY CASE

The Easy-Running Sewing Machine Company engaged Howard Dawson to solicit orders for a sewing machine manufactured by them. It was agreed that he should have a ten per cent commission on all sales made and completed by him in the course of his employment. The written contract also contained the following stipulation, to which Dawson agreed: "If, at any time, it shall appear that Howard Dawson is not devoting his exclusive time and attention to the interests of the Easy-Running Sewing Machine Company, his authority to represent and solicit orders for the said company shall terminate and be at an end." After working for some months on this basis, Dawson decided that it would be profitable for him to carry a

side line. If, after soliciting an order from a person, he was unable to sell a sewing machine, he would then attempt to sell a Victory Talking Machine. When the company learned this, they notified him that his agency was at an end. Dawson then brings suit for wrongful termination of his employment. What should be the decision of the Court?

RULING COURT CASE

Gundlach vs. Fischer, Volume 59 *Illinois Reports, Page* 172.

George Fischer, on the 3rd day of May, 1867, entered into a written agreement with Gundlach and Esler, by which Fischer was made agent, to act for Gundlach and Esler, in the sale of certain farming implements. Johnson, Pope, and others, all of whom are defendants in this action, were sureties upon the bond of Fischer. This bond was given in the sum of $1,500, to insure the faithful performance of the duties of the agency by Fischer. By the bond, the sureties became liable, in case Fischer did not account for all the moneys collected by him for the sale of the machines which he was to sell. The only provision in the contract in reference to any termination of the agency was: "And the said Gundlach and Esler agree to furnish the said George Fischer such number of machines as the said George Fischer may be able to sell, as their agent, prior to Oct. 1, 1867."

In performance of his duties, Fischer failed to account for a large sum of money which had been received by him, in payment of machines which he had sold on account of Gundlach and Esler. Thereupon, an action was brought against Johnson, Pope, and the others, who had signed Fischer's bond.

These bondsmen showed that Gundlach and Esler had furnished machines to Fischer after Oct. 1, 1867, at which time the agency terminated; and that for moneys, which he failed to account for after that date, they were not liable.

Decision: The parties to the relation of principal and agent may expressly agree upon the time when the agency shall terminate. If they do so, the relation automatically terminates at the stipulated time. So, in this case, the contract provided for an agency to last only until the 1st of October, 1867. When that time came, the agency was at an end, so far as the original contract was concerned; and the bondsmen of Fischer were then relieved of any further liability for acts, thereafter, done by Fischer.

Per Curiam: "A fair and reasonable construction of the agreement makes Fischer the agent of Gundlach and Esler, for the sale of machines, until the 1st of October, 1867. And the appellees, i. e., the bondsmen, by their obligation, undertook for the faithful discharge of all Fischer's duties as such agent, and that he should account for all moneys, notes, etc., to Gundlach and Esler, for property and machinery received prior to that date. It appears, from the evidence, that he received machinery prior to the 1st day of October, 1867, amounting to $2,023. For the faithful account of that sum, his sureties are liable, but they are not for machines or property received after that date."

Judgment was given in accordance with the opinion.

RULING LAW

Story Case Answer

We have seen that agency is a voluntary relation. Such being the case, its continuance must depend,

largely, upon the will of the parties. It may be terminated either at the will of the parties, or by operation of law. It is terminated by act of the parties, either by mutual agreement, by expiration of the time, by fulfillment of the purpose, by revocation of the principal, or by abandonment by the agent.

When the parties expressly, or by implication, limit the continuance of the agency, the relation ceases when that time limit expires, unless they mutually agree to continue the relation. In the case of *Gundlach vs. Fischer,* the parties might have mutually agreed that the agency should continue, even after the 1st of October, but that agreement would not bind the bondsmen to continue to stand as sureties for Fischer.

In the Story Case, the company provided that the agency should cease in case the agent failed to perform his duties faithfully. When he began to solicit orders for the talking machines as well as the sewing machines, he had, thereby, done an act which determined the period in which he was to act as agent, and so his agency was terminated.

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2. Revocation by the Principal

A. The Principal Has the Power to Revoke

STORY CASE

The American Publishing Company published a well bound and beautifully illustrated set of Dickens' Works, which they determined to sell through agents. George Madison applied to them for an agency to sell the edition in South Bend. The company, after looking into his qualifications, decided that Madison should be engaged. A written contract was drawn up between

the company and Madison, by which Madison was given the exclusive right to sell the edition in question, in South Bend, Indiana, for a period of one year from the signing of the contract. Madison went to South Bend and began his work. He was doing well, when the company notified him that he was discharged, as they had procured another agent to take his place. In an action brought by Madison against the company for damages, what should the Court decide?

RULING COURT CASE

Edmund Burke vs. Priest and Burke, Volume 50 *Missouri Appeals, Page* 310.

In this case, it appeared that Priest and Burke had lately been co-partners, engaged in the practice of medicine. They dissolved their relation by mutual consent. At this time there were many outstanding claims for services, which they had rendered during the continuance of their partnership relation. They went to Edmund Burke, who was a lawyer, and agreed with him that they would turn over their books of account for collection and adjustment, and further agreed to pay Edmund, as a compensation, ten per cent on all sums collected, and five per cent on all accounts adjusted. Edmund accepted their offer. But, later, Priest and Burke refused to turn over the books to him. Thereupon, he brings this action for damages.

Priest and Burke contended that they had the right to revoke his authority when they saw fit; and having exercised that authority, the agent could not complain.

Decision: The relation of principal and agent is a personal relation. The principal selects an agent for reasons which he alone knows. If, for any reason, the

agent ceases to measure up to his personal standard, he has the power to revoke the authority of his agent. This does not, necessarily, mean that he always has the right to revoke the authority. For, in some cases, he may have the power to revoke the authority and yet be compelled to pay damages to the agent for the revocation.

Mr. Justice Smith, who delivered the opinion of the Court, said in part: "The principle is rudimentary, that, as between principal and agent, the authority of the latter is revocable at any time, if not coupled with an interest. The authority of the agent to represent the principal depends upon the will and license of the principal. It is the act of the principal which creates the authority. It is for his benefit, and to subserve his purposes, that it is called into being; and, unless the agent has acquired an interest in the subject matter, it is in the principal alone that the authority is to be exercised. The agent has no right to insist upon a further execution of the authority if the principal desires it to terminate. It is a general rule, that, as between principal and agent, the authority of the latter may be revoked by the former at his will at any time, and without reason therefor, except where the agent's authority is coupled with an interest."

Judgment was given for Priest and Burke.

RULING LAW

Story Case Answer

The relation of principal and agent is a voluntary relation. Furthermore, it is a personal relation. That is to say, the principal chooses an agent to represent and act for him. He, alone, knows just what he de-

sires, in selecting a person to represent and act for him. Accordingly, if the agent fails to discharge his duties in the manner desired by his principal, the latter has the power to terminate his authority, except in cases of agencies coupled with an interest, which will be discussed later. The fact, however, that he has the power to terminate the agency does not necessarily mean that he always has the right to do so. If the relation is founded upon a contract, the principal may revoke the authority, but he must pay the agent whatever damages he may have sustained. In the Story Case, the publishing company has the power to revoke the agency of Madison, for any reason. Whether they had the right, depends upon whether they were justified because of some misconduct or incompetency of the agent. If they did not have the right, he may recover the actual damages for the wrongful dismissal as proven to the jury.

B. Principal May Have to Pay Damages

STORY CASE

The Illinois Aluminum Ware Company advertised for agents to sell certain articles manufactured by them. Donald Jones, a student in the University of Chicago, visited the company and desired an agency. The company was willing to engage him. A written contract was drawn up, by which it was provided that, for and in consideration of $5, paid by Jones to the company, Jones was appointed agent to represent and sell the wares of the company. The company gave him the exclusive right to represent them in Peoria, Illinois. During the following three weeks, Jones devoted all his time in preparing for the work. He then went

to Peoria, and was about ready to begin, when he received a notice from the company that the agency had been revoked. Jones brought suit for damages. What should be the decision of the Court under the foregoing circumstances?

RULING COURT CASE

Clark vs. Marsiglia, Volume 1 *Denio Reports (New York), Page* 317.

Marsiglia engaged Clark to clean some pictures for him at an agreed price. Clark began on the work, but before he had done a great deal, Marsiglia sent word to him, ordering him to do no more. Clark, however, went on and finished the work and demanded the full price agreed upon. Marsiglia refused to pay him the full price, contending that Clark had no right to continue the work, after he had been notified to cease.

Clark, on the other hand, contended that Marsiglia had no right to terminate his agency and that he had the right to proceed to do the full work and collect therefor, notwithstanding the notice to stop.

Decision: The principal, except in certain cases, always has the power to terminate the authority of his agency. He must, however, respond in damages when the authority was created by a valid contract, or where the authority has been acted upon to such an extent that revocation by the principal will cause damages to the agent. But, when the agent had been notified that his authority is at an end, he has no right to proceed and complete the work, and then collect the full price agreed upon.

A portion of the opinion of the Court follows: "To hold that one who employs another to do a piece of

work, is bound to suffer it to be done at all events, would sometime lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to damages consequent upon his disappointment. So, if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done, and the damages sustained by the contractor.

Judgment was given for Marsiglia, in accordance with the principles announced in the decision.

RULING LAW

Story Case Answer

We have pointed out that the principal may have the power, in most cases, to terminate the authority of his agent, but that this does not necessarily mean that he always has the right to do so. When the authority is conferred by a contract between the parties, the principal may revoke the authority, but must pay such damages as the agent has sustained by breach of the contract. Even when the authority was not conferred by a contract, if the agent has accepted the agency and entered upon the work and damages will be incurred by a termination of his authority, he may here recover such damages. In the Story Case, the company had the power to terminate the agency of Jones; but since the authority was conferred by a good contract, Jones is entitled to recover the amount of actual damages he has suffered as proven to the jury.

C. Certain Agencies Are Non-revocable

STORY CASE

Mr. J. L. Jenkins was in need of money. He went to the Second National Bank of Bloomington, where he lived, and requested a loan. The bank authorities asked him what security he could give for the same. Mr. Jenkins said that he was willing to deposit with them $1,000 in stock certificates owned by him, and to give to them the power to sell the stock in case the loan was not paid at maturity. The bank authorities agreed to the proposition, and proper papers were drawn up, evidencing the transaction. Jenkins turned over to them the stock certificates, with power to sell under the circumstances above mentioned. A few days before the loan was due to be repaid, Jenkins notified the bank authorities that he wished to revoke the power he had given. May he do so?

RULING COURT CASE

Carmichael's Case, Law Reports, 1896, *Volume* 2 *Chancery Division (English), Page* 643.

In 1896, C. B. Phillips promoted a company with the purpose that the company, when incorporated, should purchase from him certain mining property. Carmichael signed an agreement, by which he agreed, in consideration of a commission, to subscribe for 1,000 shares in the company, such number, however, to be reduced according to the number of shares taken by the public. Carmichael further agreed that the agreement and application should be irrevocable and, notwithstanding any repudiation by him, should be sufficient to authorize Phillips to apply for the shares on behalf of Carmichael, and the company to allot them.

The company was incorporated on March 24, and the subscription list was advertised to open on March 27 and close on the 30th. On March 27, Carmichael stopped payment on the check which he had given as a deposit on the shares, and wrote to Phillips that he repudiated the agreement. But Phillips, nevertheless, applied for shares of stock for Carmichael, which were allotted him by the company, and his name was placed upon the register of the corporation as a shareholder. Carmichael now brings this action asking that his name be stricken from the register, because Phillips' authority to apply for the shares had been revoked before it was exercised.

Phillips contended that this authority was coupled with an interest and was, therefore, irrevocable by any act of Carmichael.

Decision: The authority, in this case, was one coupled with an interest. Here Phillips was not merely interested to the extent that he might get a commission from the sale of the shares, but he was interested in that it would enable the corporation to buy his mining land. This constituted an agency which was irrevocable by Carmichael.

Mr. Lopes, L. J., said in the course of his opinion: "The question in this case is whether the company had authority to allot these shares to Mr. Carmichael. That question depends upon whether the authority given to Mr. Phillips, who was vendor, was revocable or not. If it was an authority coupled with an interest, it would be irrevocable. The question that really exists is whether, in this case, it is an authority coupled with an interest. I think the answer is a very short and complete one. What was the object? The object

was to enable Mr. Phillips, the vendor, to obtain his purchase money, and it, therefore, conferred a benefit on the donee of the authority. I think that Mr. Carmichael is a member of the company and not entitled to have his name struck out."

Judgment was given against Carmichael.

RULING LAW

Story Case Answer

We have seen that the principal has the power to revoke the authority of an agent in the ordinary case. But it is said that the power does not exist where the agency is one coupled with an interest. In such a case, the principal has neither the right nor the power to revoke the authority of the agent. It is difficult to define just what constitutes an agency coupled with an interest. In one sense every agency is coupled with an interest; that is, every agent has an interest in the continuance of the agency, because in its continuance his compensation rests. But to make an agency irrevocable, the agent must have an interest different from his compensation. He must have an interest in the subject matter, or the agency must be given by way of security. In the Story Case, the bank had an agency coupled with an interest, in that the power to sell the certificates was given by way of security. This being the case, the power to sell could not be revoked by Jenkins so long as the loan remained unpaid.

D. Necessity of Notice of Termination of Agent's Authority

STORY CASE

For several years Roy Harkins had made collections for the Southside Grocery business. On September 28,

1914, because of some misconduct on his part, the company discharged him. However, no notice of his discharge was given to any one. Beginning on the first of January, Harkins made several collections in the name of the company, and absconded with the money. He collected $18 from Mrs. Brown who had paid her bill to him regularly for a year. He collected from Mrs. Jones, who knew he had been in the employ of the company, and believed that he still was, though she had never paid him before. The company now attempts to collect from Mrs. Brown and Mrs. Jones again. They refuse to pay, and the company brings suit.

What should be the decision of the Court in each case?

RULING COURT CASE

Mannia vs. Meeker, Volume 162 *Illinois Reports, Page* 203.

In this case, it appears that Mrs. Meeker owned a subdivision in a Polish settlement in South Chicago. Most of the inhabitants of the settlement used the Polish language. On October 12, 1889, Mrs. Meeker agreed to convey to Mannia a lot in the subdivision owned by her. By the contract, Mannia agreed to pay Mrs. Meeker $400, in manner as follows: $100 cash in hand, receipt of which was acknowledged by the contract; $100 in one year; $100 in two years; and $100 in three years, with interest, annually, at 6 per cent. By the contract, it was further agreed that if Mannia should fail to make any payment as it came due, the contract should be forfeited, and that Mrs. Meeker would be entitled to the possession of the land.

Frey and Schlund, real estate agents, represented Mrs. Meeker in this transaction, as they had done in others previous thereto. For about a year prior to the transaction in question, one Liebner had acted as agent for Frey and Schlund. Liebner could speak the Polish language and was employed by Frey and Schlund to make collections for them among the Polish people. The fact that he was so employed was well known to most of the people in this settlement.

On or about September 1, 1891, Frey and Schlund discharged him; but no notice, whatsoever, was given of this fact; and it appeared that he was still seen around the office of Frey and Schlund frequently. On the 23rd of the same month and year, Mannia paid to Liebner $200 on his account for Mrs. Meeker, thinking that Liebner was still the duly authorized agent of Frey and Schlund. Mrs. Meeker now attempts to forfeit the contract because of the non-payment of the purchase price of the land by Mannia. Mannia brought this bill to have Mrs. Meeker compelled to give him a deed for the land in accordance with their contract.

Mrs. Meeker contends that the payment to Liebner was without any effect, because at the time he was without authority to receive payment, and that it made no difference that Mannia was without knowledge that his authority had been terminated.

Decision: Where an agent has had general authority to represent a person, and his authority has been terminated, third persons who dealt with him before, as agent, and third persons who have known of his agency, may still deal with him until they receive notice of the fact that his authority has been withdrawn. So, in this case, since Mannia had no notice

to the contrary, he is protected in his dealing with the agent, and his payment was good, and he is entitled to a conveyance by Mrs. Meeker of the land in accordance with the terms of their contract.

Mr. Justice Craig, who delivered the opinion of the Court, said in part: "Mechem on Agency, in speaking on this subject, says: 'Where a general authority is once shown to have existed, it may be presumed to continue until it is shown to have been revoked, and persons, who have dealt with the agent as such, or who have had notice of his authority, may very properly expect that if the authority be withdrawn, they will be given reasonable and timely notice of that fact and that they may, therefore, lawfully presume, in the absence of such notice, that the authority still continues. And it is, therefore, the general rule of the law, that the acts of a former general agent, within scope of his original authority, will, notwithstanding its revocation, continue to bind the former principal to those parties who have been and still are dealing with him in good faith and in reliance upon his former authority, until they have had notice of its revocation. But the rule has no application when the act done is beyond the scope of the agent's former authority, and particularly so where the act is in excess of the power which the agent himself claimed to possess.' "

Judgment was given for Mannia.

RULING LAW

Story Case Answer

When a principal had once clothed an agent with authority, it would be very unjust to permit him to withdraw that authority when he pleased, without giv-

ing notice to persons who have dealt with the agent as such, or who have known of his authority. Therefore, the law does not permit the principal to withdraw authority in this way. So, if the principal had given general authority to an agent, third persons, who have dealt with him, as agent, or who know of his authority, may still continue to deal with him and bind the former principal, until they receive notice that his authority has been withdrawn. If the agent has been given only special authority, that is, authority to do a single act, or complete a single transaction, it seems unnecessary to give notice. In the Story Case, Mrs. Brown and Mrs. Jones knew of his agency, and, having received no notice that Harkins' authority had been revoked, they are protected in paying him. This is the penalty which the company must pay for not having taken the trouble and precaution of giving proper. notice to persons who knew of the former relation.

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3. Abandonment by the Agent

STORY CASE

Phillip Morris was engaged by the Farmers' Supply Company, of Chicago, Illinois, to open up and manage a branch business in La Porte, Indiana. Morris, in consideration of a certain per cent commission on all sales made, agreed to devote his entire time and attention to business. The company agreed to engage him for two years, beginning January, 1912. During the busy season of 1913, Morris closed up the store and went on a hunting trip for a week's time. When the supply company learned of this, they immediately sent Robert Semmes down to take charge of the business,

and when Morris returned, he was notified that he was discharged. He, thereupon, brought an action against the company for wrongful dismissal. The company contended that he had abandoned his agency. What should be the decision of the Court?

RULING COURT CASE

Salkey vs. Leopold.

Asher F. Leopold engaged Samuel Salkey to act as superintendent and manager of the manufacturing department of Leopold's firm. Asher was engaged for a period of three years at $300 per month. He began work on December 1, 1874, and continued to render services until January 12, 1875. On that day he was arrested by a United States marshal upon some charge, and lodged in jail. He was not guilty as suspected, and was discharged from the jail on the 25th of the same month and year. He reported to Leopold for work, but, in the meantime, Leopold had engaged another man to take charge of the work. Salkey, thereupon, brought this action against Leopold for wrongful dismissal from his employment.

Leopold contended that his absence, whether caused rightfully or wrongfully, was an abandonment of the contract. He showed that his absence from the factory was a serious loss to the business, and that they were compelled to get someone to do his work.

Decision: When an agent is absent from his work for an unreasonable length of time, the principal is justified in withdrawing the authority of such an agent and employing another, and it is not material that his absence is caused by some third person, or even by his own sickness. What constitutes an unreasonable length

of time will depend upon the nature of the business and the circumstances of a given case. The Court was of opinion that, under the circumstances of this case, the absence of Salkey was unreasonable.

Mr. Justice Schofield, who delivered the opinion of the Court, said in part: "Where neither party is at fault, the absence of the servant from the master's employ, without his consent, (by whatever cause occasioned), for an unreasonable length of time, constitutes an abandonment. What is an unreasonable length of time, depends upon the nature and necessity of the business in which the servant is employed. Under the facts here proved, a much shorter time than that during which Salkey was in jail, might, in our opinion, be regarded as unreasonable. Under different circumstances, absence for a much greater length of time might furnish no cause for abandonment; the question being, does the delay so affect the interests of the master that the performance of the residue of the contract by the servant would be a thing different in substance from what the master contracted for."

Judgment was given for Leopold.

RULING LAW

Story Case Answer

When a principal engages an agent to do something for him, he intends and expects—and rightly—that the agent will substantially perform his duties as agreed upon. If the agent wilfully neglects, or absents himself from, his duties, the principal certainly may consider such neglect and absence as an abandonment of the contract of employment, and may put another in his place. But even if the agent is compelled to absent

himself from his employment through fault of some third person, or because of illness, nevertheless, the master is entitled to treat such unreasonable absence or neglect of duty as an abandonment of the contract. In considering what constitutes an unreasonable absence from the employment, no definite rule can be laid down; it will depend upon the facts and circumstances of each case.

In the Story Case, Morris wilfully neglected his duties as agent, and, under the circumstances, the principal was clearly justified in treating his conduct as an abandonment of the agency, and in substituting another agent in his place. Consequently, Morris is entitled to recover nothing by way of damages.

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4. Renunciation by the Agent

STORY CASE

Mr. George Mason was the owner and proprietor of a moving picture theater; in his theater he had installed a very fine pipe organ. Miss Mary Byrne applied to him to get the position of playing it during the shows. Mr. Mason finally agreed to engage her at $35 per week; she agreed to remain with him for a year at that salary. After about three months, without any cause, Miss Byrne left Mr. Mason and began to play a pipe organ for a rival moving picture theater just across the street. Mr. Mason brought an action to prevent her playing at any other theater. It was shown that she was only an ordinary performer and that many others, as competent as she, might be employed for the same salary. What should be the decision of the Court? In case Mr. Mason cannot have her stopped playing elsewhere, may he recover damages from her?

RULING COURT CASE

Cort vs. Lassard and Lucifer, Volume 18 *Oregon, Page* 221.

Cort was the manager of a certain theater. He engaged Lassard and Lucifer, who were acrobats, to act for him in his theater for a period of six weeks at a salary of $60 per week. After performing for three weeks, Lassard and Lucifer repudiated their contract and entered into a contract to act in a rival theater in the same city. Lassard and Lucifer were only ordinary actors; there was nothing unusual or extraordinary in their performances. But Cort brought this action asking that the Court restrain these two men from acting at the rival theater.

Lassard and Lucifer contended that they had the power to repudiate their agency if they wished, and that Cort could not prevent them from acting elsewhere, since it did not appear that they were actors of unusual skill and ability.

Decision: As a general rule, an agent has the same power to renounce his contract of agency as the principal has to revoke the authority of an agent. Whether in a given case, the agent has the right to renounce his employment depends upon the facts of the case. But, as a general rule, in no case will a court compel an agent to specifically perform his duties. In some cases, if it appears that his services are of unusual kind and skill, and he has contracted to give them to the principal for a given period, the principal may have him restrained from performing the same services for anyone else during the time he is engaged to give the services to the principal. In this case, since it appeared that there was nothing unusual or extraor-

dinary about the acting of these two men, the Court would not restrain them from acting at the rival theater.

Mr. Justice Lord, who delivered the opinion of the Court, said in part: "It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants, were unique or extraordinary, involving such special merit or qualification as to make such services distinctly personal and peculiar, so that in case of a default by them, the same or like services could not be easily procured, nor be compensated in damages, the Court would be warranted in applying its preventive injunction and granting relief; but otherwise, if such services were ordinary, and without special merit and such as could be easily supplied or obtained from others without much difficulty or expense."

Judgment was given for Lassard and Lucifer.

RULING LAW

Story Case Answer

It has been stated, heretofore, that, in most cases, the principal has the power to revoke the authority of his agent for any or no reason, but that this does not, necessarily, mean that he always has the right to do this. In case he does not have the right to revoke the authority, and yet does, he is liable for such damages as the agent has or may suffer from the wrongful discharge. It may be said that the same general rules apply to the renunciation by the agent of his employment. In case the agent has agreed, without consideration, to do an act, we have seen in *Thorne vs. Deas,* he is under no obligation to do the act, and is not liable

for damages if a loss results from his failure to do what he promised. If he agrees, for a consideration, to act as agent, and does not, the principal may recover damages for the breach of this contract.

No court will undertake to compel an agent to specifically perform the services he has agreed to perform, whatever may be the contract. But, if his services are of an unusual and extraordinary kind, and he has contracted to give them to a certain person for a stated period, that person may prevent him from giving the same or similar services to anyone else during that period. In the Story Case, however, Mr. Mason is not entitled to have Miss Byrne restrained from playing for his rival, because it does not appear that the services agreed to be given by her were of such unusual merit. In that case, however, she was under contract to serve him for the year, and since she left him without cause or excuse, he is entitled to recover what damages he may have suffered by her renunciation of the contract.

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5. Termination

By Operation of Law

A. Bankruptcy

STORY CASE

The Southeastern Grocery Company was a partnership engaged in the wholesale grocery business in Memphis, Tennessee. They had in their employ several traveling salesmen who sold groceries and supplies to retail grocers throughout that section of the country. On the 15th day of June, 1912, they found that they were in an insolvent condition, and on that

day filed a petition for voluntary bankruptcy. Mr. Taylor, a retail grocer in Memphis, heard of the insolvency that day, and knew that the petition had been filed, but on the afternoon of that day, he purchased a consignment of groceries from a salesman of the company, who knew nothing of the facts above given. A trustee in bankruptcy was appointed in the course of time to settle upon the affairs of the bankrupt partnership; in doing so, he took possession of all the assets of the firm. Mr. Taylor contended that he was entitled to the groceries which he had purchased from the agent. He insisted that the authority of the agent to sell was not revoked until the agent heard or learned of the bankruptcy of his principal. What should the Court decide under the foregoing circumstances?

RULING COURT CASE

Turquand vs. Elliott, Law Reports, Volume 7 Appeal Cases (English), Page 79.

Messrs. Cottam, Morton & Company were West India merchants. Charles Elliott was an agent, by them employed to look after and manage several large estates owned by the company in Jamaica. Elliott was instructed to sell one estate, called the Savoy Estate. On the 1st of October, 1877, he made a sale of this estate to one MacCormack, who paid part of the purchase price in cash, and agreed to pay the balance thereof in certain stated installments. At this time, and previous thereto, as well, the company had been indebted to the agent in a sum aggregating about 750 pounds. The company gave Elliott the authority to collect the purchase price from the Savoy Estate and apply the same to the payment of this indebtedness. On August 17, 1878, the company committed an act of

bankruptcy. On August 26, of the same year, MacCormack paid 560 pounds on the Savoy Estate, the final installment. At this time, neither the agent nor MacCormack knew of the insolvency or bankruptcy of Messrs. Cottam, Morton & Company. Elliott, in accordance with his authority, received the 560 pounds, and credited it to his account against the company. On September 26, same year, William Turquand was appointed trustee in bankruptcy of Messrs. Cottam, Morton & Company. Thereupon, Turquand brought this action to recover from Elliott this 560 pounds. Whether this recovery should be allowed, depended upon the question whether the authority of Elliott to collect this money and credit it against the account of the company was revoked by the bankruptcy, concerning which he knew nothing at the time he made the collection and credit.

It was insisted by Turquand that bankruptcy revokes the authority of an agent and his right to do any act as agent is gone.

Decision: An act of bankruptcy, committed by the principal, revokes the authority of the agent, provided that the agent knew of the bankruptcy. Until the insolvent person is finally adjudged a bankrupt and a trustee is appointed to take charge of his property, an agent, who knows nothing of the circumstances, is entitled to act. In this case, the agent, Elliott, had acted before he knew of the condition of his principal, and before his principal was finally adjudged a bankrupt. Consequently, his act was valid against the trustee.

Sir Montague E. Smith, who delivered the opinion of the Court, said in part: "The subject of the revo-

cation of general powers by an act of bankruptcy with reference to protected sales came before the Lord Justices in the case of *Ex Parte Snowball.* Lord Justice Mellish, in giving the judgment of the Court in that case, said: 'We are of opinion that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustees under a subsequent bankruptcy, still, if, after the act of bankruptcy, but before the adjudication, property is conveyed under the power to a bona fide purchaser, the purchaser may hold the property as against the trustee. It is obvious that a power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself; and whenever a sale would be binding on a bankrupt if no adjudication follows, it is binding on the trustee under a subsequent adjudication if the purchaser had no notice of an act of bankruptcy committed by the seller at the time of the sale.' Their Lordships think that this principle applies to the authority in this case, a payment having been made in pursuance of it which became a debt in a mutual account within the scope of the bankruptcy act."

Judgment was given for Elliott.

RULING LAW

Story Case Answer

It is the general rule that an act of bankruptcy committed by the principal terminates the authority of the agent to act for him thereafter. But until notice reaches third persons of the act of bankruptcy, they are protected in such dealings as they have with the

agent. When the bankrupt has been adjudicated such, the agent has no more power, in any case, to act for and bind the bankrupt, because the bankrupt himself could no longer act in his own right.

The bankruptcy of the agent also generally terminates his authority, in cases where his solvency is an important element in his competency as an agent, as for instance, where he is engaged in a mercantile business for his principal. But an agent may continue to perform certain ministerial acts, even though he is bankrupt.

In the Story Case, the authority of the agent was revoked as to Mr. Taylor, because at the time he made the purchase he knew that the grocery company had committed an act of bankruptcy. So he was not entitled to insist that the goods contracted for should be delivered.

B. Relationship Terminated by Death

STORY CASE

Mr. J. Cecil Cowan owned a beautiful country estate in Georgia. This estate had been in the Cowan family for several generations. Mr. Cowan, however, was desirous of selling it. He had only one son, Ralph, who opposed the sale, although, of course, he had no legal right to object to its consummation. Mr. Cowan went to Atlanta on September 5, and instructed a real estate agent to sell the estate as soon as he could find a purchaser. Mr. Cowan returned home that day, and during the night following, died of heart failure. On the following day, and before the real estate agent heard of Mr. Cowan's death, he made a conveyance to Mr. J. H. Killough. Mr. Killough paid the purchase money

to the real estate agent, who tendered it to Ralph Cowan, who refused to accept it. Mr. Killough, thereupon, brought an action to recover possession of the estate. What should be the decision of the Court?

RULING COURT CASE

Clayton vs. G. B. and T. D. Merrett, Volume 52 *Mississippi Reports, Page* 353.

Leroy M. Wiley was a resident of Georgia; he contracted to sell a tract of land to G. B. and T. D. Merrett, who resided in Mississippi. G. B. and T. D. Merrett gave their notes for the payment of the land. Just before the notes became due, Wiley sent them to an agent, Drane, in Mississippi, for collection. He also sent a deed to be delivered to the purchasers when they should pay the notes. Drane placed the notes in the hands of Tucker and Green, attorneys, for collection. The attorneys filed a bill and obtained a decree for the sale of the land, in which the Merretts had an equity of purchase. They purchased the land at the sale, and paid the money directly to Tucker and Green. Drane had died in the meantime, so Tucker and Green paid the money to his widow for Mr. Wiley. Mrs. Drane never accounted to anyone for the money. After all these transactions had taken place, it was then discovered that Wiley had died before the suit was brought against the Merretts, and nearly two years before Merrett had paid the money to Tucker and Green. Clayton, who was appointed administrator of Wiley, then brought this action against the Merretts to recover the purchase money.

Clayton contended that the death of Wiley revoked the authority of Drane and Tucker and Green to act

for him; such being the case, the payment made by the Merretts to Tucker and Green was wrongful, and they must pay again.

Decision: An agent acts in a representative capacity for his principal; if he has no principal, obviously, he no longer can act as agent. So it is the general rule that the death of the principal puts an end to the authority of an agent to act for him. This is true, even though the agent and persons with whom he deals has no knowledge that the principal has died in the meantime. So, in this case, the death of Wiley revoked the authority of any and all agents to act for him. Consequently, the payment by the Merretts to his former agent is no payment, and the estate of Wiley, deceased, is entitled to recover the price of the estate.

Mr. Justice Chalmers, who delivered the opinion of the Court, said in part: "The overwhelming weight of authority is to the effect that the death of the principal operates as an instantaneous revocation of the agency where it is a naked power, unaccompanied with an interest, and that every act of the agent thereafter performed is null and void so far as the estate of the of the principal is concerned. * * * * This doctrine rests upon the obvious principle that as a dead man can do no act for himself, so no man can do an act for him. When, therefore, the agent undertakes to act in his name, he is acting for a being not in existence."

Judgment was given for Clayton, the administrator.

RULING LAW

Story Case Answer

The relation of agency presupposes the existence both of a principal and an agent. When the agent goes

out to do an act in his representative capacity, he is acting in the name of his principal. The theory is that the principal is present in his agent. So it follows that if the principal has died in the meantime the act of the agent is in vain; it binds no one; it does not bind his former principal, because he himself could not have performed the act at the time it was performed. It does not bind the personal representative or the heir of the deceased, because the agent had no authority from either of them. In the Story Case, Mr. Killough could recover nothing, because the authority of the real estate agent to represent and act for Mr. Cowan was revoked before the contract was entered into. So the contract was binding upon no one.

It is also true that the death of an agent terminates the relation. Neither the heir nor the personal representative of the deceased agent has any right to insist on being permitted to take up the work of the deceased agent.

C. Relationship Not Terminated by Death Where Agent Has an Interest in Subject Matter of the Agency

STORY CASE

Mr. J. H. Rawls was the owner of an automobile. Becoming heavily indebted he went to a friend and asked a loan of $500 and offered to execute a mortgage upon the machine for security. His friend, Mr. S. J. James, agreed to make the loan. Mr. Rawls executed a mortgage upon the machine, and in it he gave Mr. James the power to sell it in case the money was not repaid within sixty days from the date of the execution of the agreement. Ten days later Mr. Rawls

died, without having paid the debt. Mr. James retained the machine until the sixty days had expired and sold it to Mr. Young for $1,500. He took from this amount his loan with interest; the balance he tendered to the personal representative of Mr. Rawls. The personal representative refused to accept the amount; he insisted that Mr. James had no right to sell the machine after the death of Mr. Rawls; he thereupon brought suit to recover the machine from Mr. Young.

What should be the decision of the Court under the foregoing circumstances?

RULING COURT CASE

Hunt vs. Rousmanier's Administrator, Volume 8 *Wheaton United States Reports, Page* 174.

Lewis Rousmanier, now deceased, applied to Hunt for a loan of $1,450. He offered to give as security, in addition to his note for the amount of the loan, a power of sale over the Brig Nereus, then at sea, of which Rousmanier was part owner. The sum requested was loaned; and thereafter Rousmanier executed two notes for the amount in question. He also executed a power of attorney, authorizing Hunt to make and execute a bill of sale of his interest in the Brig Nereus, in case the loan was not repaid within a certain time agreed upon. This instrument also contained a proviso, that the power was given for collateral security for the repayment of the two notes, and was to be void upon their repayment. If they were not paid, Hunt was authorized to sell the brig, take the amount of the loan therefrom, and turn the surplus back to Rousmanier. A loan was made in the sum of $700 with a similiar agreement in respect to the Brig Industry. Before the

return of the two vessels, Rousmanier died in an insolvent condition, having paid only a very small part of the loan. When the two brigs returned, Hunt took charge of them, and offered them for sale. The administrator of Rousmanier objected to the sale. Thereupon Hunt brought this bill to have the administrator join in the sale.

The administrator contended that the death of Rousmanier revoked any authority which Hunt had to sell the vessels in question. Hunt contended that he had an interest in the subject matter of the agency which could not be revoked by any act of the deceased, and was not revoked by his death.

Decision: The general rule is that death revokes the authority of any agent representing the deceased principal. But if the agent has an interest in the subject matter, his authority cannot be revoked by any act of the principal, nor is it revoked by the death of the principal. But the agent must have some interest or estate in the subject matter itself. The fact that he has the power to sell the subject matter and reimburse himself from the proceeds, gives him no interest therein, and such an agency is revoked by the death of the principal. That was the nature of the case. Hunt had authority to sell and reimburse himself from the proceeds, but he had no interest or ownership in the vessels; so his authority to sell was revoked by the death of Rousmanier; and he cannot compell the administrator to join in the sale.

Mr. Chief Justice Marshall, who delivered the opinion of the Court, said in part: "As the power of one man to act for another, depends on the will and license of that other, the power ceases

when the will, or this permission is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it, and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modifications. Where a letter of attorney forms a part of a contract, and is security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of the person making it, and may in general be recalled at his will, yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his mind, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked the letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

"Now as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier, and is would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death, for the attorney is in the place of the principal capable of doing that alone which the principal might do.

"This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest', it survives the person giving it, and may be executed after his death."

Judgment was given for Rousmanier's administrator.

RULING LAW

Story Case Answer

It has been seen that in the ordinary case the authority of an agent may be revoked by the principal during his life time; also that the death of the principal withdraws the authority of the agent to act. If the principal in granting authority to his agent, at the same time, and as a part of the contract, grants to the agent power of control over the subject matter of the agency, or power to sell for his own benefit, as by way of reimbursement, such a power cannot be revoked by any act of the principal during his life. But the power does not survive the death of the principal. However, if the principal grants to the agent an interest in the subject matter, it cannot be revoked by the principal during his life, nor is it revoked by the death of the principal. In the two former cases, the agent, in order to act, must act in the name of his principal; he has no principal and therefore cannot act. But in the last case, he acts in his own right, and so his right to act is not affected by the death of the person who granted him the right. In the Story Case, the agent had an interest in the subject matter. So his authority to sell the machine was not revoked by the death of Mr. Rawl, and he passed good title to Mr. Young. Therefore the personal representative of Mr. Rawl cannot recover the machine.

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